SUPREME COURT, U. S.
FEB 12 1968
JOHN F. DAVIS, CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1967

No. 660

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACH, SAND LAKE and NORTH GREENBUSH, RENSSELAER COUNTY and CHATHAM, COLUMBIA COUNTY and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3, TOWNS OF NORTH HEMPSTEAD and OYSTER BAY, NASSAU COUNTY, NEW YORK,

Appellants,

—v.—

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York,

Appellee,

—and—

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH and BARBARA BRENNAN,

Intervenor-Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

NOTICE OF APPEAL FILED—AUGUST 17, 1967

PROBABLE JURISDICTION NOTED—JANUARY 15, 1968

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Docket Entries

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Complaint

Plaintiff, by its attorney, Marvin E. Pollock, complaining of the defendant, alleges:

1. At all the times herein mentioned, the plaintiff was and still is a body corporate existing under and by virtue of the Education Law of the State of New York, and vested by the said Education Law with the general management, operation, control and maintenance of all public schools within Central School District No. 1, Towns of East Greenbush, Nassau, Schodack, Sand Lake and North Greenbush, Rensselaer County and Chatham, Columbia County (hereinafter referred to as "Central School District No. 1"), and is provided with and is authorized to expend public moneys for the sole purpose of administering the affairs of the public schools in Central School District No. 1 under the system of public education of the State of New York in accordance with the Constitution and laws of the State of New York.

2. Upon information and belief, at all the times herein mentioned, the defendant was and still is the Commissioner of Education of the State of New York.

3. Under the said Education Law the Commissioner of Education of the State of New York is required to apportion the amount annually appropriated by the Legislature of the State of New York for the public schools and any amounts so apportioned are required to be expended exclusively for school purposes authorized by the Constitution and laws of the State of New York.

4. The Constitution of the State of New York in Section 3 of Article XI, provides, in relevant part:

"Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, * * * "

5. The First Amendment to the Constitution of the United States of America, made applicable to the State of New York by the Fourteenth Amendment, provides, in relevant part:

"Congress shall make no law respecting an establishment of religion * * * "

6. In accordance with sundry provisions of the said Education Law, among them Sections 701, 1709, and 1804, the plaintiff is authorized and empowered to purchase with public moneys such textbooks as may be necessary for the proper and efficient management of the public schools in Central School District No. 1, and to loan, rent or sell the same to pupils attending such schools.

7. Pursuant to such provisions of law, the plaintiff for some years past has purchased and now purchases textbooks with public moneys, and the same have been loaned, rented and sold to pupils attending the public schools in Central School District No. 1.

8. The plaintiff may not lawfully purchase textbooks with public moneys for free loan to pupils attending schools or institutions of learning wholly or in part under the con-

trol or direction of any religious denomination, or in which any denominational tenet or doctrine is taught (hereinafter referred to as "religious schools") or to such schools themselves, and to do so would be and is in violation of the Constitution and Education Law of the State of New York and the Constitution of the United States of America.

9. The defendant may not lawfully apportion to the plaintiff from public moneys appropriated by the Legislature of the State of New York for public schools any amounts used or to be used to purchase textbooks for free loan to pupils attending religious schools or to such schools themselves, and to do so would be and is in violation of the Constitution and Education Law of the State of New York and the Constitution of the United States of America.

10. Notwithstanding the foregoing provisions of the Constitution and Education Law of the State of New York and the Constitution of the United States of America, the Legislature of the State of New York, on or about June 1, 1965, purported to pass a certain "Act to amend the education law, in relation to the loan of textbooks to pupils in grades seven through twelve," the same being known as Chapter 320 of the Laws of 1965, to take effect September 1, 1966, and purporting to amend Section 701 of said Education Law. A copy of Section 701 as so amended is annexed hereto as Exhibit 1, the changes therein being indicated by brackets (for deletions) and italics (for additions).

11. Section 701 as so amended directs the boards of education in the several cities and school districts of the state, including the plaintiff, to purchase textbooks with public moneys and to loan the same free not only to pupils at-

tending public schools, as under present law, but also to pupils attending, among others, religious schools, without limit either as to the number of textbooks required to be so purchased and loaned or the amounts of public moneys to be expended therefor, and also directs the Commissioner of Education of the State of New York, in addition to the annual apportionment of public moneys pursuant to the said Education Law, to apportion to each school district, including Central School District No. 1, an amount equal to the cost of the textbooks so purchased and loaned, but not more than $10 a pupil.

12. Upon information and belief, failure on the part of the plaintiff to implement Section 701 as so amended, which is mandatory in nature, would subject its members to removal from office by the defendant under Sections 306 and 1706 of the said Education Law.

13. Despite its own serious doubts as to the constitutionality of Section 701 as so amended, in view of the mandatory nature of that Section and the removal power of the defendant referred to in paragraph 12 hereof, the plaintiff has been compelled to include in its proposed 1966-1967 budget an appropriation of funds to comply with Section 701 as so amended, which funds would otherwise not have been appropriated or would have been appropriated for lawful purposes.

14. The plaintiff must continue to take steps to implement Section 701 as so amended including the submission of the said budget to the voters of Central School District No. 1 on May 4, 1966, and will be compelled to purchase textbooks with public moneys for free loan to pupils resid-

ing in Central School District No. 1 who attend religious schools.

15. Upon information and belief, the defendant Allen, as Commissioner of Education of the State of New York, has taken and will continue to take steps to implement Section 701 as so amended and has apportioned or will apportion to the plaintiff public moneys appropriated or to be appropriated by the Legislature of the State of New York for the public schools for the purchase and free loan of textbooks to pupils residing in Central School District No. 1 who attend religious schools.

16. Chapter 320 of the Laws of 1965, in so far as it provides for the purchase of textbooks with public moneys for free loan to pupils attending religious schools, is unconstitutional and void in that it authorizes and permits the use of public moneys in aid and maintenance of religious schools in violation of Section 3, Article XI of the Constitution of the State of New York and the First Amendment to the Constitution of the United States of America made applicable to the State of New York by the Fourteenth Amendment.

WHEREFORE, the plaintiff demands judgment as follows:

1. That Chapter 320 of the Laws of 1965 in so far as it provides for the purchase of textbooks with public moneys for free loan to pupils attending religious schools be declared unconstitutional and void.

2. That the defendant, as Commissioner of Education of the State of New York, be restrained from removing or attempting to remove from office any member of the plaintiff Board of Education who either refuses or fails to com-

ply with Chapter 320 of the Laws of 1965 in so far as it requires the purchase of textbooks with public moneys for free loan to pupils residing in Central School District No. 1 who attend religious schools.

3. That the defendant, as Commissioner of Education of the State of New York, be restrained from apportioning to any school district any public moneys appropriated by the Legislature of the State of New York for public schools for the purchase of textbooks for free loan to pupils attending religious schools in the State of New York.

4. That the plaintiff have such other, further and different relief as the Court deems just and proper, together with costs.

(Verified April 28, 1966.)

EXHIBIT 1 ANNEXED TO COMPLAINT

§ 701. Power to designate text-books; purchase *and loan* of textbooks [and]; *purchase of* supplies [for sale or rental]. 1. In the several cities and school districts of the state, boards of education, trustees or such body or officer as perform the functions of such boards, shall designate textbooks to be used in the schools under their charge.

2. In the several cities and school districts of the state, boards of education, trustees [or other school authorities may purchase text-books and supplies and either rent or sell the same to the pupils attending the public schools in such cities and school districts upon such terms and under such rules and regulations as may be prescribed by such boards of education, trustees or other school authorities.] *or such body of officers as perform the function of such boards shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, textbooks. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities. Such text-books are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities.*

3. In the several cities and school districts of the state, boards of education, trustees or other school authorities may purchase supplies and either rent, sell or loan the same to the pupils attending the public schools in such cities and school districts upon such terms and under such rules and regulations as may be prescribed by such boards of education, trustees or other school authorities.

4. The Commissioner of Education, in addition to the annual apportionment of public monies pursuant to article seventy-three of this chapter, shall apportion to each school district an amount equal to the cost of the text-books purchased and loaned by the district pursuant to this section, but in no case shall the aid apportioned to the district be in excess of ten dollars per pupil for each pupil who resides within the school district and is loaned text-books pursuant to this section.

Defendant's Answer

Defendant, by his attorney, Louis J. Lefkowitz, Attorney General of the State of New York, for his answer to the complaint herein, alleges as follows:

1. Admits the allegations contained in paragraphs numbered 1, 2, 3, 4, 5 and 14 of the complaint herein.

2. Denies the allegations contained in paragraphs numbered 8, 9 and 16 of the complaint herein.

3. Denies knowledge or information sufficient to form a belief as to the allegations of paragraphs numbered 7 and 13 of the complaint.

4. As to the allegations of paragraph 6 of the complaint, defendant denies the allegations thereof except admits that plaintiff is authorized to purchase with public money, textbooks to be used by pupils in grades one through six in the public schools of the district and to provide such textbooks to the pupils therein (Education Law, § 703), and is further mandated to purchase and loan, upon individual request, textbooks to children enrolled in grades seven through twelve in either public or private schools in the district (Education Law, § 701).

5. As to the allegations of paragraph 10 of the complaint, defendant denies the allegations thereof, except he admits that the Legislature of the State of New York passed "An Act to amend the education law, in relation to the loan of textbooks to pupils in grades seven through twelve" and that such bill was signed by the Governor and became Chap-

ter 320 of the Laws of 1965, to take effect September 1, 1966, and that said Chapter amended Section 701 of the Education Law as set forth in Exhibit 1, attached to the complaint herein.

6. As to the allegations of paragraph 11 of the complaint, denies the allegations thereof, as to the provisions of Section 701, as amended, and for the provisions of said Section 701 reference is hereby made to the contents thereof.

7. As to the allegations of paragraph 12 of the complaint, defendant denies the allegations thereof and for the provisions of Education Law, § 306, reference is made to the provisions thereof.

8. As to the allegations of paragraph 15, defendant admits the same, except denies knowledge or information sufficient to form a belief as to any pupils residing in the plaintiff district who attend religious schools.

• • • • •

WHEREFORE, the defendant respectfully moves, in accordance with Rule 3211 of the Civil Practice Law and Rules, that the complaint be dismissed on the grounds set forth in paragraphs 9, 10, 11, and 12 above, and further requests that the complaint be dismissed on the ground that Education Law, § 701 is in all respects constitutional, or that summary judgment be granted to defendant holding that Education Law, § 701, as amended by Chapter 320 of the Laws of 1965, is constitutional and valid, and that defendant have such other, further and different relief as the Court deems just and proper.

(Verified May 16, 1966.)

Stipulation Amending Complaint and Answer

May 18, 1966

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties herein that the complaint herein shall be deemed amended by the addition thereto of the following paragraph:

> "11A. There are pupils residing in Central School District No. 1 who are enrolled in grades seven through twelve in religious schools in the State of New York which comply with the compulsory education law."

IT IS HEREBY FURTHER STIPULATED AND AGREED that the defendant shall be deemed to have answered paragraph 11A of the complaint by denying knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

Affidavit of Intervenor-Defendants

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH and BARBARA BRENNAN, each being duly sworn, depose and say:

1. Each of us is a citizen of the United States and of the State of New York, and resides within the geographical limits of Central School District No. 1, Towns of East Greenbush, Nassau, Schodack, Sand Lake and North Greenbush, Rensselaer County and Chatham, Columbia County.

2. Each of us is the owner of real property in said school district, assessed by the tax authorities in a sum exceeding $1,000 and each of us has within the past year paid taxes upon said assessment, including school taxes paid to said Central School District No. 1.

3. Each of us is the parent of a child or children who are in regular attendance at the following schools in the grades hereinafter indicated, and each of said children will be entitled to the loan of text books under Section 701 of the Education Law, which the plaintiff in this action claims to be unconstitutional. All of said children are attending said schools under the compulsory education laws, and each of said schools is a private school which complies with the compulsory education law. The names and addresses of your deponents as well as the names of their respective children, the school they legally attend and their respective grades therein, are as follows:

Name and Address of Parent	*Child*	*School*	*Grade*
Michael Rock 101 Mohawk Avenue Hampton Manor New York	Michael, III	St. Mary's School Hampton Manor New York	6th
Anthony Dwileski Ridge Road Prospect Heights New York	Michael	St. Mary's School Hampton Manor New York	8th
Peter Girzone 10 Mohawk Avenue Hampton Manor New York	Edmond	St. Mary's School Hampton Manor New York	7th
Doreen Beaudin 32 St. Clair Avenue Hampton Manor New York	John, Jr.	St. Mary's School Hampton Manor New York	7th
Charles Haigh 33 Electric Avenue East Greenbush New York	Mary Rose	Holy Spirit School East Greenbush New York	7th
	Margaret	St. John's Academy Rensselaer, New York	11th
	Elizabeth	St. John's Academy Rensselaer, New York	9th
Barbara Brennan Troy Road East Greenbush New York	Ann	Holy Spirit School East Greenbush New York	7th
	Mary Theresa	St. John's Academy Rensselaer, New York	9th

4. Each of us has purchased and expended funds for the purchase of all of the textbooks which our children have used in attendance at the said schools, including textbooks of the type which they will be entitled to receive on loan pursuant to Section 701 of the Education Law.

5. We make this affidavit in support of an application to intervene as defendants in this action for the purpose of supporting the constitutionality of the school textbook law which is being attacked by the plaintiff and of supporting the right of our children to receive the loan of textbooks under that law. We have read the affidavit of

James J. MacKrell, sworn to on May 18th, 1966 and endorse the statements contained therein.

MICHAEL J. ROCK,
ANTHONY DWILESKI,
PETER J. GIRZONE,
DOREEN BEAUDIN,
CHARLES L. HAIGH,
BARBARA BRENNAN.

(Sworn to May 18, 1966.)

Affidavit of James J. MacKrell

JAMES J. MACKRELL, being duly sworn, deposes and says:

1. I am an attorney-at-law of the State of New York, residing at Elliott Road, in the Town of East Greenbush, Rensselaer County, New York, and having been retained by Michael Rock, Anthony Dwileski, Peter Girzone, Doreen Beaudin, Charles Haigh, and Barbara Brennan, hereinafter described as "the proposed intervenors", to represent their interests and to protect their rights and the rights of their children in this action.

2. The plaintiff in this action is the Board of Education of Central School District No. 1, Towns of East Greenbush, Nassau, Schodack, Sand Lake and North Greenbush, Rensselaer County, and Chatham, Columbia County, hereinafter called "the District". The defendant is the Commissioner of Education of the State of New York. The complaint (copy of which is annexed to this affidavit as Exhibit A) was served upon the defendant on or about April 29, 1966. I am advised that the defendant has not yet answered or made any motion addressed to the complaint.

3. The purpose of this action, according to the complaint, is to enjoin the defendant Commissioner from complying with or enforcing the provisions of Section 701 of the Education Law, as amended, insofar as it permits and requires the loan of textbooks to children attending schools which comply with the compulsory education law and which are operated under religious auspices throughout the State, to declare that Section unconstitutional, and to enjoin the defendant Commissioner from removing the members of the plaintiff Board from office if they fail or refuse to comply with that Section.

4. The District has a total population of approximately 35,000. Within the District there are 6 public grade schools and 2 public high schools, with a total enrollment of approximately 4,418 pupils, of whom approximately 1,903 are enrolled in grades seven to twelve.

5. There are also within the District two Catholic parochial schools, namely, St. Mary's School in Clinton Heights in the Township of East Greenbush and the Holy Spirit School located in the Township of East Greenbush. Each of these schools duly complies with the compulsory education law and each gives instruction in grades kindergarten through eight, except as hereinafter indicated. St. Mary's School in Clinton Heights has an enrollment of approximately 329, of whom approximately 52 are enrolled in the seventh and eighth grades; Holy Spirit School has an enrollment of approximately 305, of whom approximately 27 are enrolled in the seventh grade this year. An eighth grade will be added to Holy Spirit School next year.

6. There is no high school located within the District other than public. Parents in the District, who wish to send their children to high schools other than public, send them, for the most part, to high schools located in nearby cities.

7. The six proposed intervenors whom I represent are citizens of the United States and of the State of New York and residents of the District. All six of them are owners of real property in the District and have paid taxes currently thereon, including school taxes paid to the District. All six of them are parents of children who are residing in the District and who are attending Catholic parochial schools in the District pursuant to the compulsory education laws and who will be entitled under Section 701 of the Education Law to receive the loan of textbooks in

connection with their studies at those schools. Also two of them are parents of children who are residing within the District and who are attending Catholic high schools outside the District pursuant to the compulsory education laws and who will be likewise entitled under Section 701 of the Education Law to receive from the District the loan of textbooks in connection with their studies at those schools.

8. The interest of the proposed intervenors in supporting the constitutionality of the law here under attack and in securing the benefits of that law for their children, is direct and vital. That interest is not now directly represented, and may not be adequately represented by the defendant Commissioner, since the Commissioner himself is not a direct recipient of benefits conferred by the statute now challenged and is not a member of the class for whose benefit the statute was enacted. All of the proposed intervenors, and their children, on the other hand, are members of the class which the Legislature intended to aid, and for whose benefit the law was enacted. All of them are affected by this action and each and all of them may be bound by the judgment herein. In addition, their claim and their defense, based on the constitutionality of the law here under attack, present common questions of law and fact with the claims and defense of the parties in this action, as to the constitutionality of the law here under attack as it affects these intervenors and their children, and the proposed intervenors and their children are persons directly interested in this action.

9. The law, which plaintiff attacks, provides in substance that school districts throughout the State shall loan textbooks, covering secular subjects only, to children enrolled in grades seven to twelve of both public schools and private

schools which comply with the compulsory education law. It is plaintiff's claim, as set forth in the complaint, that this law is unconstitutional insofar only as it applies to children attending private schools (such as those attended by the children of the intervenors) which comply with the compulsory education laws and which are conducted under religious auspices. It is the position of the proposed answer (annexed as Exhibit B to this affidavit) that to deny the loan of such textbooks to children attending duly qualified private schools because those schools are conducted under religious auspices, while providing such loans to other children attending other schools, would be, as to the intervenors and their children and others similarly situated, an interference with their freedom of religion, a denial of equal protection of the laws, and a denial of due process, contrary to both the Constitution of the United States and the Constitution of the State of New York.

10. If the proposed intervention is granted, it will not delay the determination of the action or prejudice the substantial rights of any party.

11. I make this affidavit in support of an application for an order to show cause why the proposed intervention should not be granted, because it is imperative that the proposed intervenors be brought in as parties defendant at the earliest possible moment to insure the proper protection of their rights and the rights of their children, and to prevent delay to the parties.

12. No previous application for the relief herein sought has been made to any court or judge.

JAMES J. MACKELL

(Sworn to May 17, 1966.)

Order of Intervention

May 27, 1966

The motion of Michael Rock, Anthony Dwileski, Peter Girzone, Doreen Beaudin, Charles Haigh and Barbara Brennan for leave to intervene as parties defendant in this proceeding having come on to be heard, pursuant to order to show cause dated May 19, 1966, now, on reading and filing said order to show cause, the joint and several affidavits of Michael Rock, Anthony Dwileski, Peter Girzone, Doreen Beaudin, Charles Haigh and Barbara Brennan, sworn to May 18, 1966 and the affidavit of James J. MacKrell sworn to May 17, 1966, in support of said motion, with proof of due service thereof, and upon the proposed answer of the proposed intervenor-defendants herein, and attached as Exhibit B to the aforesaid affidavit of James J. MacKrell, and after hearing James J. MacKrell, Esq. of counsel for the proposed intervenor-defendants in support of said motion and it appearing that the attorneys for the plaintiff and defendant do not oppose said motion for leave to intervene, and due deliberation having been had and the Court being of the opinion that the proposed intervention will not unduly delay the determination of the action or prejudice the substantial rights of any party,

Now, on motion of James J. MacKrell, Esq., attorney for the proposed intervenor-defendants, it is

ORDERED:

1. That the application of Michael Rock, Anthony Dwileski, Peter Girzone, Doreen Beaudin, Charles Haigh and Barbara Brennan be and the same hereby is granted and that said proposed intervenors and each of them are hereby added as intervenor-defendants to the above entitled action.

2. That the caption of this action be and the same hereby is amended to add the above named intervenors as intervenor-defendants in said action, and that said intervenor-defendants shall be entitled to be heard in all subsequent proceedings herein.

3. That said proposed intervenors be and hereby are granted leave to serve and file within five days from the date of this order a verified answer substantially in the same form as the proposed answer annexed as Exhibit B to the moving affidavit of James J. MacKrell.

Enter,

ISADORE BOOKSTEIN,
J.S.C.

Answer of Intervenor-Defendants

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE; DOREEN BEAUDIN, CHARLES HAIGH and BARBARA BRENNAN, by their attorney, James J. MacKrell, for their answer to the complaint herein:

1. Admit the allegations contained in paragraphs numbered "2", "4" and "7" of plaintiff's complaint.

2. Deny knowledge or information sufficient to form a belief as to the allegations contained in paragraph numbered "12" of plaintiff's complaint.

3. Deny each and every allegation contained in paragraphs numbered "8", "9" and "16" of plaintiff's complaint.

4. Deny each and every allegation of paragraph of the plaintiff's complaint numbered "1", except that they admit that at all the times mentioned in the complaint the plaintiff was and still is a body corporate existing under and by virtue of the Education Law of the State of New York and vested by the said Education Law with the powers and duties therein specified.

5. Deny each and every allegation of paragraph of the plaintiff's complaint numbered "3", except that they admit that the Commissioner of Education of the State of New York is vested with the powers and duties specified in said Education Law.

6. Deny each and every allegation of paragraph of the plaintiff's complaint numbered "5", except that they admit

that the First Amendment to the Constitution of the United States of America, made applicable to the State of New York by the Fourteenth Amendment, provides in relevant part that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof * * * ."

7. Deny each and every allegation of paragraph of the plaintiff's complaint numbered "6", except that they admit that the plaintiff is authorized, empowered and required to purchase and distribute textbooks as provided by the Education Law of the State of New York.

8. Deny each and every allegation of paragraph of the plaintiff's complaint numbered "10", except that they admit that the Legislature of the State of New York duly passed and the Governor, on June 1, 1965, signed Chapter 320 of the Laws of 1965 to take effect September 1, 1966 and amending Section 701 of the Education Law.

9. Deny each and every allegation of paragraph of plaintiff's complaint numbered "11", except that they admit that Section 701 of the Education Law of New York, as amended, directs the boards of education in the several cities and school districts of the State, including the plaintiff, to purchase textbooks with public money and loan them to pupils enrolled in grades 7 to 12 of public and private schools which comply with the compulsory education law, all as provided in said Section 701, as amended.

10. Deny each and every allegation of paragraph of plaintiff's complaint numbered "13", except that they admit that the plaintiff has included in its proposed 1966-

1967 budget an appropriation of funds to comply with Section 701 of the Education Law as amended.

11. Deny each and every allegation of paragraph of plaintiff's complaint number "14", except that they admit that the plaintiff is and will be required to comply with Section 701 of the Education Law, as amended.

12. Deny each and every allegation of paragraph of plaintiff's complaint numbered "15", except that they admit that the defendant Commissioner of Education has complied and so far as these intervenors are presently advised will continue to comply with the requirements of Section 701 of the Education Law as amended.

For a first, affirmative and complete defense to the complaint of the Plaintiff herein, the Intervenor-Defendants allege and respectfully show this Court:

13. The children of the intervenor-defendants and other children similarly situated are attending, in compliance with the compulsory education laws of the State of New York, private schools which comply with said compulsory education laws and said children have the right, guaranteed by the Constitutions of the United States and of the State of New York, so to attend. Said children have a right under the laws of New York to receive the loan of textbooks designated for use in public elementary or secondary schools of the State pursuant to Section 701 of the Education Law as amended.

14. To forbid the loan of such textbooks to the children of the intervenor-defendants and others similarly situated, in lawful attendance under the compulsory education laws at private schools conducted under religious auspices which

comply with said laws while permitting the loan of such textbooks to children attending other private schools not under religious auspices, would be an interference with the free exercise and enjoyment of religion by the intervenor-defendants and their children and others similarly situated and would be contrary to the First and Fourteenth Amendments to the Constitution of the United States and contrary to Article 1, Section 3, of the Constitution of the State of New York.

For a second, affirmative and complete defense to the complaint of the Plaintiff herein, the Intervenor-Defendants allege and respectfully show this Court:

15. Repeat each and every allegation contained in paragraph numbered "13" of this answer, and incorporate the same herein as though fully set forth.

16. To forbid the loan of such textbooks to the children of the intervenor-defendants and others similarly situated, in lawful attendance under the compulsory education laws at private schools conducted under religious auspices which comply with the said laws, while permitting the loan of such textbooks to children attending other private schools not under religious auspices, would be a denial to the intervenor-defendants and their children and others similarly situated of the equal protection of the laws and a discrimination against them because of their creed and religion, and would be contrary to the Fourteenth Amendment to the Constitution of the United States and contrary to Article 1, Section 11, of the Constitution of the State of New York.

For a third, affirmative and complete defense to the complaint of the Plaintiff herein, the Intervenor-Defendants allege and respectfully show this Court:

17. Repeat each and every allegation contained in paragraph numbered "13" of this answer, and incorporate the same herein as though fully set forth.

18. To forbid the loan of such textbooks to the children of the intervenor-defendants and others similarly situated, in lawful attendance under the compulsory education laws at private schools conducted under religious auspices which comply with the said laws, while permitting the loan of such textbooks to children attending other private schools not under religious auspices, would be a deprivation and denial to the intervenor-defendants and their children and others similarly situated of their liberty and property without due process of law and would be contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States and contrary to Article 1, Section 6, of the Constitution of the State of New York.

WHEREFORE, intervenor-defendants demand judgment that Section 701 of the Education Law, as amended, be declared valid and constitutional and that the complaint be dismissed.

JAMES J. MACKRELL,
Attorney for Intervenors,
Office and P. O. Address:
849 New Loudon Road,
Latham, New York.

(Verified May 18, 1966.)

Order Adding Party Plaintiff

SUPREME COURT

ALBANY COUNTY

August 2, 1966

At the conclusion of arguments on the motions herein heard before Hon. T. Paul Kane, at a Special Term, Part I of this Court, on July 8, 1966, the attorney for the plaintiff having informed the Court that the Board of Education of Union Free School District No. 3, Towns of North Hempstead and Oyster Bay, Nassau County, New York ("Roslyn School Board") had voted to join in this action as a co-plaintiff and had requested the attorney for the plaintiff to take the necessary steps to accomplish that result, and the attorney for the plaintiff having made an oral motion for an order joining the Roslyn School Board as a plaintiff herein, and the attorneys for the defendant and intervenor-defendants having consented in open court to the entry of such an order, and the attorneys for all the parties having consented at the foot of this order to the entry hereof without further notice, it is hereby

ORDERED, that the Board of Education of Union Free District No. 3, Towns of North Hempstead and Oyster Bay, Nassau County, New York ("Roslyn School Board") be and it hereby is joined as a party plaintiff in this action, and it is further

ORDERED that the complaint herein as amended be deemed to allege a cause of action by the Roslyn School Board against the defendant in all respects the same as the cause of action alleged therein by the plaintiff, except that wher-

ever reference is made to Central School District No. 1, it shall be deemed to refer to the Roslyn School Board, and it is further

ORDERED that the answers herein be deemed to stand as answers to the cause of action alleged by the Roslyn School Board, and it is further

ORDERED that the Roslyn School Board be deemed to have joined in the motion by the plaintiff for judgment on the pleadings, and it is further

ORDERED that the motions by the defendant and intervenor-defendants for judgment dismissing the complaint or in the alternative for judgment declaring Chapter 320 of the Laws of 1965 constitutional shall be deemed to apply to the cause of action alleged by the Roslyn School Board.

Enter

T. PAUL KANE,
J.S.C.

Decision of Supreme Court, Albany County

August 18, 1966

T. Paul Kane, J.:

Section 701, Subdivision 3 of the Education Law of the State of New York was amended by Chapter 320 of the Laws of 1965 to become effective September 1, 1966. It provides as follows:

> "3. In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books. Textbooks loaned to children enrolled in grades seven to twelve of said private schools shall be textbooks which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities. Such textbooks are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities."

The significant portion of this amendment is, of course, the requirement that school districts must purchase textbooks for pupils enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law. Plaintiffs are the Board of Education of Central School District No. 1, Towns of East Green-

bush, Nassau, Schodack, Sand Lake and North Greenbush, Rensselaer County and Chatham, Columbia County, and also the Board of Education of Union Free District No. 3, Towns of North Hempstead and Oyster Bay, Nassau County, New York, pursuant to a stipulation of the parties and an order of this court. Said plaintiffs, hereinafter known as "Greenbush Board" and "Roslyn Board" respectively, bring an action against James E. Allen, Jr. as Commissioner of Education of the State of New York, and seek a judgment declaring the above mentioned portion of Chapter 320 of the Laws of 1965 unconstitutional and void and to restrain the defendant from appropriating any money for the purposes of said section or any other action in regard thereto. Heretofore parents of certain pupils, residents of plaintiff's Greenbush Board District, who attend private schools and who are entitled to the benefits proposed by the statutory provision under attack, have been granted leave to intervene by order of the court. They shall hereinafter be identified as "intervenor-defendants".

The defendant Commissioner has moved to dismiss the complaint, or in the alternative for judgment declaring the statute in question in all respects constitutional and valid. Intervenor-defendants make a similar motion and the plaintiffs cross-move for summary judgment for the relief demanded in the complaint. There is thus before the court the determination of the constitutionality of a state statute. The answer of the defendant Commissioner contains five separate affirmative defenses, the third of which questions the plaintiffs' standing to bring such an action against the State or an officer thereof, and also the plaintiffs' capacity to question the constitutionality of a State statute. Obviously a disposition of this defense must be made before there can be any consideration of the merits of the action.

To this court the matter of status or standing is not clear cut. Granted there is apparent substantial authority prohibiting a municipality or agency of the state from challenging a state statute (Black River Regulating District v. Adirondack League Club, 307 N. Y. 475), but the rule could be subject to some conditions and limitations, which appear particularly appropriate in the pending matter. A school district and its Board of Education is more than a mere agent of the State. It is an entity performing a state purpose pursuant to the mandate of the people as directed by their constitution. (New York State Constitution Article 11, Section 1; Education Law, Section 2(14); Matter of Divisich v. Marshall, 281 N. Y. 170). The fulfillment of its purpose requires considerations that exceed the powers of a regulating district as prescribed in the Black River case, supra. This distinction is recognized by the statutory definition of defendant's powers which refer to the Commissioner's advice and guidance to the school officers of all districts of the state "in relation to their duties and the general management of the schools under their control". Education Law, Section 305 (2). Among these duties is a requirement to comply with the provisions of the Education Law. If, however, the Board of Education, as evidenced by this action, concluded that they were being compelled to perform an unlawful act, what is their remedy? Certainly they should have the right to properly litigate any question affecting the performance of their duties. "A grant to school organizations of the power to maintain actions implies a legislative intent that such organizations should prosecute any action they might deem necessary for the protection; and preservation of school funds and property." 79 C. J. S. Schools and School Districts, Section 429.

The members of a Board of Education should not, as an alternative, be subjected to a removal statute. (Education Law, Section 306). Furthermore, they should not be required to perform and be met with a taxpayer's action. As an additional impediment to access to the courts, there is considerable authority for the position that such an action would not lie under General Municipal Law, Section 51, since it has been held that a school district is not a municipal corporation. (General Municipal Law, Section 2; Brooks v. Wyman, 220 A. D. 204, affd. 246 N. Y. 534; Johnston v. Gordon, 247 A. D. 40.) An action brought by a resident of the district as a taxpayer, would be met with the identical barrier offered as defendant's third affirmative defense. (St. Clair v. Yonkers Raceway, 13 N. Y. 2d 72; Bull v. Stichman, 273 A. D. 311, affd. 298 N. Y. 516.) While there may be historical and practical considerations for the rule as established, there are graver and more disturbing problems created by a broad application thereof. Specifically, can these plaintiffs in effect be foreclosed from access to the courts? To pursue the matter further, an extension of this rule will eventually not only restrict the court in, but effectively prohibit it from the performance of its function in the balance of power structure as a third arm of our government. This power in the court to strike down a statute as unconstitutional belongs to the people, and while it requires the imposition of limitations and restraints, certain flexibility should also exist in order to avoid an unjust result. In other words, this power in the courts is so basic that a denial of it to the people could, *per se*, be a violation of a constitutional right. (U. S. Constitution, Amendment XIV, Section 1; City of Buffalo v. State Board of Equalization and Assessment, 26 A. D. 2d 213, citing Matter of Bond & Mortgage Guarantee Co., 249

A. D. 25, affd. 274 N. Y. 593). Therein a county clerk questioned the constitutionality of a state statute that required him to exempt certain corporations from the payment of fees. The court rejected his argument holding that compliance with the statute did not affect his rights as a county clerk. "The constitutional guaranty does not extend to the mere interest of an official, as such, *who has not been deprived of his property without due process of law or denied the equal protection of the laws.* (Columbus & Greenville R. Co. v. Miller, 283 U. S. 96)," 249 A. D. 25, 27 (emphasis supplied). This rule would also apply to plaintiffs, since a denial of access to the courts may well contravene their constitutional rights. Furthermore, under such circumstances consideration should be given to the position of the resident district taxpayer, not a party to this proceeding, if his constitutional rights may be impaired. (United States v. Raines, 362 U. S. 17, 23.)

As a result, the court, for the reasons stated, finds that these plaintiffs do possess the necessary standing to maintain the within action. The third and fourth affirmative defenses set forth by defendant cannot be sustained, the first affirmative defense has been rendered moot by an amendment to the complaint, the second and fifth affirmative defenses are without foundation.

Thus the court reaches the merits of the controversy upon these motions. The Constitution of the State of New York, Article 11, Section 3, provides as follows:

> "Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direc-

tion of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning." (Formerly § 4 of Art. 9, renumbered and amended by Constitutional Convention of 1938; approved by the people Nov. 8, 1938.)

It would seem that the statute under attack contravenes this provision of the Constitution, Article 11, Section 3, supra. It was so held by the courts of this state some years ago when a similar statute was rendered unconstitutional in Smith v. Donahue, 202 A. D. 656. In that case the implementation of the statute involved the purchase of textbooks and school supplies for parochial schools directly rather than loan upon request by the student of such schools. Therein, as in the case before this court, the question of the "pupil benefit theory" was argued, requiring a determination herein as to whether the Smith case can be considered precedent. It should be noted, when discussing a provision for supplies running directly to the school, the court said at page 664:

"These supplies are to be furnished in the same manner and to the same party as textbooks. It seems to us to be giving a strained and unusual meaning to words if it holds that the books and the ordinary school supplies, when furnished for the use of pupils, is a furnishing to the pupils and not a furnishing in aid or maintenance of a school of learning. It seems very plain that such furnishing is at least indirectly in aid of the institution and that, if not in actual violation of the words, it is in violation of the true intent and mean-

ing of the Constitution and in consequence equally unconstitutional."

Earlier the court set forth its definition of a school district and its component parts at page 663:

> "A school district is a district of and for the public schools; it was organized here as such and exists as such. The school is not the building and its equipment; it is the organization, the union of all the elements in the organization to furnish education in some branch of learning—the arts or sciences or literature. It is the institution, and the teachers and scholars together, that make it up. The pupils are part of the school."

It would seem, at least, the court had in mind a rejection of what is referred to as the "pupil benefit theory". Of course this theory was later advanced in Judd v. Board of Education, 278 N. Y. 200 and specifically rejected by the Court of Appeals. The substance of this decision was the unconstitutionality of the public transportation of students to parochial schools, which shortly thereafter was provided for by constitutional amendment. (Constitution of the State of New York, Article 11, Section 3.) There is no indication nor can this court find any authority for the proposition that this constitutional amendment ratified the child benefit theory after its rejection in the Judd case. Zorach v. Clauson, 303 N. Y. 161, cited by defendant and intervenor-defendants, does not sustain their position. Therein an unsuccessful attack was made upon the "release time" program (Education Law, Section 3210 (1)). However, the thrust of the argument was directed at New York Constitution, Article 1, Section 3, rather than Article 11, Section 3. It should be noted, however, that the court,

in referring to the matter of released time observed at page 169: "In the instant case, there is no 'use' of tax-supported 'property or credit or any public money' 'directly or indirectly' 'in aid or maintenance' of religious instruction (People *ex rel.* Lewis v. Graves, 245 N. Y. 195, 198 * * *)." It would seem, at least by implication, that what was not found objectionable in Zorach v. Clauson, supra, may be present in the matter at hand. A history of this issue in the State of New York compels one conclusion: we are squarely facing a constitutional prohibition. The court is little troubled in perceiving this prohibition in Article 11, Section 3 of our State Constitution, with due consideration for and acknowledgment of the strict rules applicable to those who question the constitutionality of a state statute including but not limited to the rule the unconstitutionality must be demonstrated beyond a reasonable doubt. Wiggins v. Town of Somers, 4 N. Y. 2d 215.

However, the court is somewhat hazy in perceiving the atmosphere created by recent decisions in the Supreme Court of the United States under the First Amendment made applicable to the States by the Fourteenth Amendment (Cantwell v. Connecticut, 310 U. S. 296), and their effect upon the efficacy of this State statute under attack. It is even difficult to find a point of departure. However, it would seem that the more recent decisions, properly define the mode of thinking regarding the applicable portions of the First Amendment (Engel v. Vitale, 370 U. S. 421; Abington School Dist. v. Schempp, 374 U. S. 203). The specific words of Amendment I are "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *." A reading of the above mentioned cases makes it difficult to conclude that the statute in question is not in violation of both the

establishment clause and the free exercise clause. This becomes even more obvious if the effect of the implementation of this statute is projected to the point where parents of students at private schools begin to rely upon the assistance of public moneys for textbooks, and private schools anticipate this reliance in the preparation of their budgets. If the textbooks provided at some subsequent time become unacceptable or even arguable as offensive to private schools, is there some form of financial compulsion present that would affect a purportedly voluntary decision by either a parent or a representative of a private school? Mathematic texts, mentioned in oral arguments of counsel, perhaps present no problem, but what of history, science or social studies in general that are or will be part of a public school curriculum. Might this program prelude potential interference in a private school program, or might it precipitate the commingling of private and public school programs to the extent that each would ultimately compromise basic principles for financial or academic expediency. Broader implications of these thoughts are found in the concurring opinion of Mr. Justice Brennen in Abington School Dist. v. Schempp (supra, at page 242):

> "The relationship of the Establishment Clause of the First Amendment to the public school system is preeminently that of reserving such a choice to the individual parent, rather than vesting it in the majority of voters of each State or school district. The choice which is thus preserved is between a public secular education with its uniquely democratic values, and some form of private or sectarian education, which offers values if its own. In my judgment the First Amendment forbids the State to inhibit that freedom

of choice by diminishing the attractiveness of either alternative—either by restricting the liberty of the private schools to inculcate whatever values they wish, or by jeopardizing the freedom of the public schools from private or sectarian pressures. The choice between these very different forms of education is one —very much like the choice of whether or not to worship—which our Constitution leaves to the individual parent. It is no proper function of the state or local government to influence or restrict that election. The lesson of history—drawn more from the experiences of other countries than from our own—is that a system of free public education forfeits its unique contribution to the growth of democratic citizenship when that choice ceases to be freely available to each parent."

These implications are further advanced in the concurring opinion of Mr. Justice Douglas in the same case at page 229:

"But the Establishment Clause is not limited to precluding the State itself from conducting religious exercises. It also forbids the State to employ its facilities or funds in a way that gives any church, or all churches, greater strength in our society than it would have by relying on its members alone. Thus, the present regimes must fall under the same clause for the additional reason that public funds, though small in amount, are being used to promote a religious exercise. Through the mechanism of the State, all of the people are being required to finance a religious exercise that only some of the people want and that violates the sensibilities of others.

> The most effective way to establish any institution is to finance it; and this truth is reflected in the appeals by church groups for public funds to finance their religious schools. Financing a church either in its strictly religious activities or in its other activities is equally unconstitutional, as I understand the Establishment Clause. Budgets for one activity may be technically separable from budgets for others. But the institution is an inseparable whole, a living organism, which is strengthened in proselytizing when it is strengthened in any department by contributions from other than its own members.
>
> Such contributions may not be made by the State even in a minor degree without violating the Establishment Clause. It is not the amount of public funds expended, as this case illustrates, it is the use to which public funds are put that is controlling. For the First Amendment does not say that some forms of establishment are allowed; it says that 'no law respecting an establishment of religion' shall be made. What may not be done directly may not be done indirectly lest the Establishment Clause become a mockery."

The court is aware of the implications contained in these views as they may affect many federal and state programs in aid of students attending private educational institutions under religious auspices. However, it is this court's duty, as it sees it, to determine the specific question before it based upon what it believes to be the law.

Accordingly, for the reasons stated, the motions of the defendant and intervenor-defendants are denied and the cross-motion of the plaintiffs for summary judgment is in all respects granted, each without costs.

Submit order on five days notice. All papers to attorneys for plaintiffs.

Order and Judgment of Supreme Court, Albany County

August 29, 1966

The defendant having moved for an order dismissing the complaint herein, as amended, on the ground that it fails to state a cause of action, or in the alternative for judgment declaring Chapter 320 of New York Laws of 1965 to be in all respects constitutional and valid, and the intervenor-defendants having made a similar motion, and the plaintiffs having cross-moved for judgment declaring Chapter 320 of New York Laws of 1965 unconstitutional and void insofar as it provides for the purchase of textbooks with public moneys for free loan to children enrolled in grades seven to twelve of schools or institutions of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, complying with the compulsory education law (said children hereinafter referred to as "pupils attending religious schools"), for certain ancillary relief, and for such other, further and different relief as the Court may deem just and proper, and the motions having duly come on to be heard before this Court on July 8, 1966, and after hearing Hon. Louis J. Lefkowitz, Attorney General of the State of New York, the attorney for the defendant, by Jean M. Coon, Assistant Attorney General, of counsel, in support of the defendant's motion, James J. MacKrell, Esq., attorney for the intervenor-defendants, by Porter R. Chandler, Esq., of counsel, in support of intervenor-defendants' motion, and Marvin E. Pollock, Esq., attorney for the plaintiffs, in support of plaintiffs' cross-motion;

Now, on reading and filing the defendant's notice of motion, dated May 16, 1966, the intervenor-defendants'

notice of motion, dated June 14, 1966, the plaintiffs' notice of cross-motion, dated May 19, 1966, the complaint herein, verified April 28, 1966, the stipulation amending the complaint herein, dated May 18, 1966, the defendant's answer herein, verified May 16, 1966, the intervenor-defendants' answer herein, verified May 18, 1966, the order to show cause made by Hon. Isadore Bookstein, dated May 19, 1966, the affidavits of James J. MacKrell, Esq., sworn to May 17, 1966, and of Michael Rock, Anthony Dwileski, Peter Girzone, Doreen Beaudin, Charles Haigh and Barbara Brennan, sworn to May 18, 1966, in support of said order to show cause, the order on intervention, made by Hon. Isadore Bookstein, dated May 27, 1966, the order joining as a party plaintiff herein the Board of Education of Union Free District No. 3, Towns of North Hempstead and Oyster Bay, Nassau County, New York, made by Hon. T. Paul Kane, dated August 2, 1966, and upon all the pleadings and proceedings herein, and due deliberation having been had, and on filing the opinion of the Court dated August 18, 1966 denying the motions of the defendant and intervenor-defendants and granting the plaintiffs' cross-motion, it is

ORDERED that the said motion of the defendant is hereby denied in all respects without costs; and it is further

ORDERED that the said motion of the intervenor-defendants is hereby denied in all respects without costs; and it is further.

ORDERED that the said cross-motion of the plaintiffs is hereby granted in all respects without costs; and it is further

ORDERED, ADJUDGED AND DECREED that Chapter 320 of the New York Laws of 1965, as amended by Chapter 795 of

the New York Laws of 1966, insofar as it provides for the purchase of textbooks with public moneys for free loan to pupils attending religious schools is hereby declared unconstitutional and void and in violation of Article XI, Section 3 of the Constitution of the State of New York; and it is further

ORDERED, ADJUDGED AND DECREED that Chapter 320 of the New York Laws of 1965, as amended by Chapter 795 of the New York Laws of 1966, insofar as it provides for the purchase of textbooks with public moneys for free loan to pupils attending religious schools is hereby declared unconstitutional and void and in violation of both the establishment and free exercise clauses of the First Amendment to the Constitution of the United States of America; and it is further

ORDERED, ADJUDGED AND DECREED that the defendant is hereby enjoined from apportioning to any school district in the State of New York any public moneys appropriated by the Legislature of the State of New York for public schools for the purchase of textbooks for free loan to pupils attending religious schools, and from taking any other action to implement or effectuate the provisions of said law, as amended, hereby declared to be unconstitutional and void; and it is further

ORDERED, ADJUDGED AND DECREED that the defendant is hereby enjoined from removing or attempting to remove from office any member of either of the plaintiffs who either refuses or fails to comply with the provisions of said law, as amended, hereby declared to be unconstitutional and void.

Enter,

T. PAUL KANE,
J.S.C.

Decision of Appellate Division

December 30, 1966

Judgment and order reversed, on the law, and complaint dismissed, without costs.

Opinion per Herlihy, J., in which Gibson, P. J., and Reynolds, J., concur.

Staley, Jr., and Brink, JJ., concur in the result, in an Opinion per Staley, Jr., J.

Order of Reversal of Appellate Division

January 6, 1967

The Defendant-Appellant and the Intervenor-Defendants-Appellants having appealed from an order and judgment of the Supreme Court, entered on the 30th day of August, 1966, in the office of the Clerk of the County of Albany, and said appeal having been presented during the above stated term of this Court, and having been argued by Mrs. Jean M. Coon, of counsel for Louis J. Lefkowitz, Attorney General of the State of New York, counsel for Defendant-Appellant, and by Porter R. Chandler, Esq., of counsel for James J. MacKrell, Esq., counsel for Intervenor-Defendants-Appellants, and by Marvin E. Pollock, Esq., of counsel for the Plaintiffs-Respondents, and, after due deliberation, the Court having rendered a decision on the 30th day of December, 1966, it is hereby

ORDERED, that the judgment and order appealed from be, and the same hereby is, reversed, on the law, and the complaint dismissed, without costs.

Enter:

JOHN J. O'BRIEN,
Clerk.

Opinions of Appellate Division

Majority Opinion

Herlihy, J.

This is an appeal from an order and judgment which declared Chapter 320 of the Laws of 1965 in violation of the Constitutions of the State of New York and of the United States.

Section 701 of the Education Law provides for the purchase of textbooks with public monies for loan to students enrolled in grades 7 through 12 in public or private schools. The constitutional question involves the issue of using such funds for the purchase of books to be loaned to students in schools under the control or direction of a religious denomination.

The plaintiffs seek a declaratory judgment that the said law is unconstitutional insofar as providing for the purchase of textbooks with public funds for free loan to pupils attending religious schools and to restrain the Commissioner of Education from removing or attempting to remove any member of the plaintiff Board of Education for failure to comply with the said law and restraining the said commissioner from apportioning to any school district any public monies for the purpose of carrying out the law insofar as it may apply to pupils attending religious schools.

The commissioner in his answer denies the various allegations and in addition raises the defense of lack of standing by the plaintiffs to bring the action and that there is no justiciable controversy.

We are satisfied that the statute does not contravene the Constitution of the United States or that of the State of

New York but since we determine, as set forth hereinafter, that the plaintiffs have no standing or status to bring the present action, we do not base our decision upon the merits.

The defense of the lack of standing to raise the constitutional issue, set forth in the answer of the commissioner, concerns the identical issue recently considered by this court in *City of Buffalo* v. *St. Bd. of Equalization* (26 A. D. 2d 213, 215) and we find no compelling argument on the present record to distinguish a school board from a municipality. There is a consistent line of appellate court decisions to the effect that a public body—in the present instance the Board of Education—has no standing to challenge a State statute restricting its governmental powers (*County of Albany* v. *Hooker*, 204 N. Y. 1, 9-10; *Black Riv. Reg. Dist.* v. *Adirondack League Club*, 307 N. Y. 475, 487, app. dsmd. 351 U. S. 922, 76 S. Ct. 780).

The basic principle involved is that the municipality or other agency is the creation of the State, subject to its direction and control. The extent, nature and purpose of such governmental powers are within the absolute discretion of the State and any alteration, impairment and destruction of these powers by the Legislature present no question of constitutionality. School boards, such as the plaintiffs herein, are the creation of the State, dependent upon the State for existence and performing their function subject to the control and direction of the State under the aegis of the Education Department through its commissioner.

As we stated in *City of Buffalo* (*supra*, p. 215): "[I]f consideration should be given to relaxing the rule * * * it is not a decision to be made by an intermediate appellate court."

As the concurring opinion notes, there are decisions where a Board of Education sues the commissioner, but not under

the present circumstances, and the citations are not controlling. We would also note that an examination of the complaint does not substantiate the statement that the action can be interpreted to have been brought by the individual members of the respective boards. (See *St. Clair* v. *Yonkers Raceway,* 13 N. Y. 2d 72, 76.) As to procedural restrictions in reaching legal issues, see *Matter of Bd. of Educ.* v. *Nyquist* (23 A. D. 2d 592).

The judgment and order should be reversed, on the law, and the complaint dismissed.

Gibson, P. J., and Reynolds, J., concur. Staley, Jr., and Brink, JJ., concur in the result, in an opinion per Staley, Jr., J.

CONCURRING OPINION

STALEY, JR., J.

This is an appeal from an order and judgment of Special Term entered in Albany County August 30, 1966, which declared chapter 320 of the Laws of 1965 unconstitutional and in violation of both article XI, section 3 of the Constitution of the State of New York, and the First Amendment of the Constitution of the United States, insofar as it provides for the purchase of textbooks with public moneys for loan to students enrolled in grades seven through twelve in schools under the control or direction of a religious denomination, and which enjoined the defendant-appellant from removing from office any member of the plaintiff school board who failed to comply with the provisions of such law, and which enjoined the defendant-appellant from apportioning to any school district any public moneys for the purchase of textbooks for free loan to such students.

The plaintiff-respondent seeks a declaratory judgment determining that the Education Law, as amended by chapter 320 of the Laws of 1965, insofar as it provides for loan of secular textbooks to students attending schools, wholly or in part, under the control of a religious denomination is unconstitutional, and also for an injunction against the Commissioner of Education from removing members of the plaintiff school board from office for refusing to comply with the statute, and from appropriating money to school districts for the purpose of purchasing textbooks for such students.

The defendant-appellant is the Commissioner of Education of the State of New York, and the intervenor-defendant-appellants are parents of children residing in the school district attending Catholic parochial schools. Prior to the enactment of chapter 320, these parents purchased all of the textbooks used by their children, including textbooks of the type which they will be entitled to borrow pursuant to the said law. The appellants moved for dismissal of the complaint on the ground that it failed to state a cause of action, or for summary judgment declaring the statute constitutional, and the plaintiff cross-moved for judgment declaring the statute unconstitutional.

The constitutional and statutory provisions involved are the following:

"U. S. Const. Amend. I:

'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *'

U. S. Const. Amend. XIV:

'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States, * * * nor deny to any person within its jurisdiction the equal protection of the laws.'

N. Y. Const. Art. XI, § 3:

'Neither the state nor any subdivision thereof shall use its property or credit or any public money, or otherwise authorize or permit either to be used, directly or indirectly in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught * * *.'

Education Law, § 701 (2), as amended by L. 1965, c. 320:

'In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities.'"

The first question presented is whether or not the plaintiff school board of education has the legal capacity to institute an action for declaratory judgment involving the constitutionality of a state statute.

Subdivision 3 of section 701 of the Education Law, as amended by chapter 320, provides:

> "* * * boards of education * * * shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in * * * a public or private school which complies with the compulsory Education Law, textbooks."

Each member of the plaintiff school board took an oath of office obligating himself to support the Constitution of the United States and the Constitution of the State of New York. Any school board member willfully disobeying any rule or regulation of the commissioner, may be removed from office by the commissioner after a hearing. (Education Law, §§ 306, 1706.) Furthermore, the commissioner may withhold from any district public moneys for willfully disobeying any provision of law or any decision, order or regulation of the commissioner. (Education Law, § 306.)

The Department of Education, on January 10, 1966 advised the District Superintendents of local school districts that, under the law:

> "* * * all boards of education * * * have the power and it shall be their duty to purchase and to loan textbooks upon individual request to all children residing in the district enrolled in grades seven through twelve of a public or non-public school * * *."

The very nature of the relief sought indicates that it was the intent of the plaintiff to bring this action, not only in the capacity of a school board, but in their individual capacities as board members, to protect their civil right as elected officials to continue in office. Every citizen has capacity to sue, as differentiated from a right to relief, unless they are under some disability, and this right exists

regardless of the title or status of the plaintiff. (*Lincoln Field, et al.* v. *Allen,* 9 A. D. 2d 551.) By reason of the direct personal interests of the individual members of the board whose right to hold office may be directly affected, we are of the opinion that the plaintiffs could bring this lawsuit against this defendant.

The right of a local board of education to sue the State Commissioner of Education has frequently been upheld including actions involving the question of constitutionality of state statutes. (*Matter of Board of Education of Central School District No. 2* v. *Allen,* 14 A. D. 2d 429; *Matter of Bethlehem Union Free School* v. *Wilson,* 303 N. Y. 107; *Matter of Board of Education of Union Free School District No. 3, Town of Oyster Bay* v. *Allen,* 6 A. D. 2d 316, affd. 6 N. Y. 2d 871.)

The appellants rely primarily on the cases of *Black River Regulating District* v. *Adirondack League* (307 N. Y. 475) and *City of Buffalo* v. *State Board of Equalization and Assessment* (26 A. D. 2d 213). In these cases, the issues involved a curtailment of the governmental powers of state agencies and, as such they were subject to the control or direction of the state, and the nature of their powers could be altered, impaired or destroyed by the state.

The *Black River* and *City of Buffalo* cases do not deal with the right of public officials to challenge the constitutionality of a statute requiring them to take affirmative nonministerial action which they regard as unconstitutional. The said cases, holding that a state agency cannot question the power of the State Legislature to reduce its governmental powers, deal with a wholly different problem.

In the *City of Buffalo* case, this court held that the Mayor of the City of Buffalo had no standing in his official capacity

to challenge a state statute relating to exemptions from local real estate tax assessments.

The court stated at page 214 as follows:

> "The present Mayor's duties remained substantially unaltered and in his brief the only allegation is that he has the duty to protect the interests of the residents of the City of Buffalo and that the action was brought as the result of a resolution passed by the Common Council of that city. There is no allegation in the complaint, or otherwise, that in his capacity of Mayor, or his rights thereunder, there has been any impairment or prejudice of the same."

The plaintiff here alleges that the members of the school board may be prejudiced by removal proceedings if they fail to administer a state statute which is alleged to be unconstitutional.

The capacity of a school board to sue the Commissioner of Education, having been established by the courts in numerous decisions, such right should be available to challenge by an action for declaratory judgment a statute which may or may not compel the plaintiff to violate the constitution.

The second question presented is whether or not the provisions of article XI, section 3, of the New York State Constitution is violated by the statutory provisions of chapter 320 of the Laws of 1965.

The statement of policy set forth in chapter 320 provides as follows:

> "Section 1. Statement of policy. The security and welfare of the nation require the fullest development of the mental resources and skills of its youth. This

calls for more adequate educational opportunities and increased efforts to educate more of the talent of our nation and requiring the correction of those imbalances in our educational programs which have led to an insufficient proportion of our population educated in the fields of science, mathematics, foreign languages and other nonsectarian subjects. The Congress of the United States has reaffirmed the principle that the states and local communities retain primary responsibility for public education. It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense, and the general welfare of the state." (N. Y. Sess. Laws 1965, Ch. 320, § 1.)

The fundamental importance of textbooks in the educational process is clear. President Johnson in his Education Program Message of January 12, 1965, noted:

> "The explosion of knowledge and the rapid revision of curriculums in the schools has created new demands for textbooks. The obsolete text can suffocate the learning process. Yet the cost of purchasing textbooks at increasing prices puts a major obstacle in the hands of education—an obstacle that can and must be eliminated." (111 Cong. Rec. 499, 500.)

The prohibition contained in article XI, section 3, of the State Constitution relates to the use of public property or money "directly or indirectly in aid or maintenance • • • of any school or institution of learning, wholly or in part, under the control or direction of any religious denomination • • •."

Chapter 320 provides for educational aids to the child, rather than through a subsidy to the school, by a loan of textbooks, the property of the school district, only to school children and only upon their individual request. The textbooks available for loan are those "designated for use in any public, elementary, or secondary schools of the state or are approved by any board of education, trustees, or other school authorities."

By the enactment of chapter 320, the state has recognized the education explosion of the 1960s, and that a uniformly high standard of education is a public responsibility.

The development of educational aid programs by both the Federal and state governments has resulted in benefits to students of public and non-public schools for the purpose of raising educational standards in New York State.

The New York State Scholar Incentive Program and the New York State Regents Scholarship Program, N. Y. Education Law §§ 601, 601-a have provided large sums for students attending universities under religious auspices. Students in nonsecular schools receive benefits under the Federal school lunch program administered by the State, New York Education Law § 3713, and from availability of health and welfare services through public schools, New York Education Law § 912.

The basic purpose of chapter 320 is thus readily ascertainable as an aid to the school child rather than as an indirect aid to the school. The provisions of article XI, section 3, of the New York State Constitution prohibits the use of property or money directly or indirectly in aid of any religious school or institution. Chapter 320 provides that secular textbooks may be furnished to the school child and not to the school. The books are furnished only on request of the child. They receive the property of the

state or of the school district and are furnished on loan only. The availability of books to students at nonsecular schools is little different from the availability of books in a public library, which are loaned to individuals regardless of race, color or creed.

In the case of *Chance* v. *Mississippi State Textbook Rating and Purchasing Board* (190 Miss. 453, 200 So. 706), a similar textbook law was challenged as contravening the Mississippi constitutional prohibition of appropriated funds for the support of any sectarian school. The court held that the constitutional provision did not forbid acts calculated to serve the educational needs of the child rather than to aid the school and stated as follows:

> "The religion to which children of school age adhere is not subject to control by the state; but the children themselves are subject to its control. If the pupil may fulfil its duty to the state by attending a parochial school it is difficult to see why the state may not fulfil its duty to the pupil by encouraging it 'by all suitable means.' The state is under duty to ignore the child's creed, but not its need. It cannot control what one child may think, but it can and must do all it can to teach the child how to think. The state which allows the pupil to subscribe to any religious creed should not, because of his exercise of this right, proscribe him from benefits common to all."

We are of the opinion that the intent and purpose of chapter 320 was to provide additional educational aid to all school children attending the grades from seven through twelve, and that the statute did not aid directly or indirectly the school attended by said child. The statute, having been

enacted in the furtherance of a sound public policy to provide "more adequate educational opportunities" for school children, in the absence of any clear, unambiguous language forbidding such specific educational aid, it must be held non-violative of the state constitution.

A statute similar to the one here in issue was held valid by the Supreme Court of the United States, in the case of *Cochran* v. *Board of Education* (281 U. S. 370). The *Cochran* case involved a Louisiana statute under which school books were to be supplied to all school children of the state. The Louisiana Supreme Court held that the statute did not violate the section of that state's constitution prohibiting state aid to churches, sects or religious denominations. Chief Justice Hughes, in his opinion, affirming the holding of the Louisiana Supreme Court, quoted a portion of that court's opinion as follows:

> "The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or non-sectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children of the state alone are beneficiaries."

The respondents and the court below rely mainly on the cases of *Smith* v. *Donohue* (202 App. Div. 656) and *Judd* v. *Board of Education* (278 N. Y. 200) to support their conten-

tion that chapter 320 violates the state constitution. In both cases, it was held that the statutes involved violated the provisions of article XI, section 3, of the state constitution, to the extent that they provided aid to children attending non-public schools.

The *Smith* case concerned a statute which provided for the supply of free textbooks to children in public schools. In addition, the statute provided that the textbooks were to be supplied to the schools directly instead of to students upon individual application by the student.

In the *Judd* case, a statute providing for public transportation of students to parochial schools, was declared to be unconstitutional by a four to three vote. Soon after the Court of Appeals' decision, a constitutional amendment which approved such bus transportation was adopted. (Article XI, section 3, approved by the People November 8, 1938.)

The dissenting opinion in the *Judd* case stated as follows at page 220:

> "The statute is not designed to aid or maintain the institutions themselves * * *. The statute in question does not have the effect of giving public money, property, or credit in aid or maintenance of religious schools. The aid is given to the pupils who are legally attending such schools, to assist them to spend the required time in attendance upon instruction."

The development and acceptance of the "child-benefit principle" by the courts demonstrates that constitutional prohibitions against aid to parochial schools are properly interpreted to prevent programs designed to foster paro-

chial education as such, but not to prevent programs designed to improve the secular education of all children even though some students, thus aided, may attend religiously affiliated schools.

The third question is whether or not chapter 320 violates the No Establishment Clause and the Free Exercise Clause of the First Amendment to the Constitution of the United States. The original purpose of the No Establishment Clause was to protect religious liberty, and to preclude any governmental preference to any particular sect. The state statute here involved, provides for loans of textbooks for children in order to benefit the general welfare by extending their non-sectarian knowledge essential to their future development as citizens with no sectarian purpose.

In the case of *Everson* v. *Board of Education* (330 U. S. 1), a New Jersey statute was upheld as constitutional, which provided for payments to parents of parochial school children in reimbursement for the cost of transporting their children to parochial schools. Similar to the *Cochran* case (*supra*), the pupil-benefit principle was applied. The court, holding that the establishment clause cannot be applied to deny the benefit of a public welfare program to individuals because of religion, stated as follows:

> "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *be-*

cause of their faith or lack of it, from receiving the benefits of public welfare legislation.".

In the case of the *Matter of Zorach* v. *Clauson* (303 N. Y. 161, affd. 343 U. S. 306), a state statute which provided for absence from public schools by students for religious observance and education was held constitutional.

The court stated at page 171 as follows:

> "The Supreme Court has recognized, in a religious freedom case, that to 'make accommodation between these freedoms' guaranteed by the First Amendment and 'an exercise of state authority' is always 'delicate' (*Prince* v. *Massachusetts,* 321 U. S. 158). Such freedoms are not absolute (*Dennis* v. *United States,* 341 U. S. 494; *Breard* v. *Alexandria,* 341 U. S. 622; *Schenck* v. *United States,* 249 U. S. 47). Numerous situations involving some incidental benefit to religion have been found constitutionally unexceptionable (*Everson* v. *Board of Educ.,* 330 U. S. 1; *Cochran* v. *Louisiana State Bd. of Educ.,* 281 U. S. 370; *Bradfield* v. *Roberts,* 175 U. S. 291). Tax exemption of church properties (Tax Law, § 4, subd. 6) is but another of many illustrations, and the practice is generally followed. * * * It is thus clear beyond cavil that the Constitution does not demand that every friendly gesture between church and State shall be discountenanced."

See also, *64th Street Residences* v. *City of New York* (4 N. Y. 2d 268); *Baer* v. *Kolmorgen* (14 Misc. 2d 1015); *Scales* v. *Board of Education* (41 Misc. 2d 391).

Chapter 320 does not involve affirmation by the state of religious beliefs nor religious activities with the public schools. The statute is completely neutral with respect to

religion, since it merely makes available secular textbooks to requesting students, regardless of the schools they attend. It completely meets the test for constitutionality under the First Amendment as stated by United States Supreme Court in *Abington School District* v. *Schempp* (374 U. S. 203, 222):

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution * * * there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

Chapter 320 of the Laws of 1965 does not violate either the provisions of the Federal or State Constitution, and is constitutional in all respects.

The judgment and order should, therefore, be reversed, on the law, and the complaint dismissed.

COURT OF APPEALS

Remittitur

June 1, 1967

BE IT REMEMBERED, That on the 1st day of February in the year of our Lord one thousand nine hundred and sixty-seven, Board of Education of Central School District No. 1, Towns of East Greenbush, & ors., &c., the appellants in this cause, came here unto the Court of Appeals, by Marvin E. Pollock, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And James E. Allen, Jr., as Commissioner of Education of the State of New York, the respondent, and Michael Rock, & ors., the intervenors-respondents in said cause, afterwards appeared in said Court of Appeals by Louis J. Lefkowitz, Attorney General, and James J. MacKrell, their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Marvin E. Pollock, of counsel for the appellants, and by Jean M. Coon, of counsel for the respondent, and by Mr. Porter R. Chandler, of counsel for the intervenors-respondents, briefs filed by amici curiae, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

Opinions of Court of Appeals

Majority Opinion

Scileppi, J. Section 1 of chapter 320 of the Laws of 1965 provides in part: "It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense, and the general welfare of the state." (L. 1965, ch. 320, § 1.)

In keeping with this declaration of policy, the Legislature enacted subdivision 2 (renum. subd. 3 by L. 1966, ch. 795) of section 701 of the Education Law permitting the appropriate school authorities "to purchase and to loan upon individual request, to all children * * * who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, textbooks. Textbooks loaned to children enrolled in grades seven to twelve of said private schools shall be textbooks which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities. Such textbooks are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities."

Plaintiffs seek judgment that this statute violates both the State and Federal Constitutions (N. Y. Const., art. XI, § 3; U. S. Const., 1st and 14th Amdts.). The defendant Commissioner of Education and the intervenors-defendants, parents of children residing in plaintiffs' school district

who attend parochial schools, moved for dismissal of the complaint for failure to state a cause of action or for summary judgment declaring the statute constitutional. The plaintiff Boards of Education cross-moved for summary judgment declaring the statute unconstitutional.

Special Term denied all defendants' motions and granted plaintiffs' cross motion, holding that the plaintiffs had standing to sue; that the statute contravenes section 3 of article XI of the State Constitution (the "Blaine Amendment"); and that the statute violates the establishment and free exercise clauses of the First Amendment.

The Appellate Division reversed upon the ground that the plaintiffs had no standing.

Since we must reach the merits in this case,[1] we come to the question whether this statute violates section 3 of article XI of the New York State Constitution: "Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning."

The last portion of this section, relating to the transportation of children, was added by special amendment to obviate the decision in *Judd* v. *Board of Educ.* (278 N. Y. 200 [1938]).

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[1] The writer and Judges BURKE and BERGAN agree with the Appellate Division majority that plaintiffs have no standing. Judge KEATING, who is for affirmance on the merits, agrees with the dissenters that plaintiffs do have standing.

In *Judd*, this court by a vote of four to three declared that a law which provided for school busing of parochial school children could not be sustained because it constituted indirect aid to schools which was in violation of the Blaine Amendment. *Judd* determined that, although school busing was primarily for the benefit of the child, it still had the effect of giving an incidental benefit to sectarian schools and thus ran afoul of section 3 of article XI prohibiting indirect aid. It is now argued that the statute before the court providing for textbooks loans to all children, including those attending parochial schools, must be unconstitutional for the same reason. We cannot agree with the reasoning of the majority in the *Judd* case and accordingly hold that it should not be followed. The New York State Constitution prohibits the use of public funds for a particular purpose; that is, aiding religiously affiliated schools. Certainly, not every State action which might entail some ultimate benefit to parochial schools is proscribed. Examples of co-operation between State and church are too familiar to require cataloguing here. As we said, although in a different context: "It is thus clear beyond cavil that the Constitution does not demand that every friendly gesture between church and State shall be discountenanced. The so-called 'wall of separation' may be built so high and so broad as to impair both State and church, as we have come to know them". (*Matter of Zorach* v. *Clausen*, 303 N. Y. 161, 172, affd. 343 U. S. 306.) The architecture reflected in *Judd* would impede every form of legislation, the benefits of which, in some remote way, might inure to parochial schools. It is our view that the words "direct" and "indirect" relate solely to the means of attaining the prohibited end of aiding religion as such.

The purpose underlying section 701, found in the Legislature's own words (L. 1965, ch. 320, § 1, *supra*), belies any interpretation other than that the statute is meant to bestow a public benefit upon all school children, regardless of their school affiliations. There can be no serious suggestion that the declaration of purpose by the Legislature was a verbal smoke screen designed to obscure a nefarious scheme to circumvent the New York State Constitution. No one in the last third of the 20th Century can doubt that a program aimed at improving the quality of education in all schools is a matter of legitimate State concern.

Since there is no intention to assist parochial schools as such, any benefit accruing to those schools is a collateral effect of the statute, and, therefore, cannot be properly classified as the giving of aid directly or indirectly.

Only textbooks designated for use by the public schools or approved by Boards of Education, trustees or school authorities may be lent (Education Law, § 701, subd. 3). The State and local governments have long provided public libraries with books for use by all persons. It is not uncommon for schools, public and private alike, to assign various "outside readings" to pupils. Children often, then, fulfill assignments for courses in both public and private schools by means of using and borrowing from public libraries. We do not consider this indirect aid to private or parochial schools.

At a time when we have large-scale Federal and State aid to education, it is justly feared that children who are denied these benefits may receive education inferior to children in public schools. Unless certain types of aid can be made available to *all* children, we run the risk of creating an

educational lag between children in public and private schools. We cannot perpetuate an erroneous interpretation of the State Constitution merely because it is contained in the reports of this court.

Having decided that section 701 entails no aid to the parochial schools, we thus hold that there is no Federal constitutional question under the establishment clause of the First Amendment. The State makes no affirmation of religious beliefs or activities within the public schools. Section 701 remains completely neutral with respect to religion, merely making available secular textbooks at the request of the individual student and asking no question about what school he attends. Despite the flexibility of the English language, it is impossible to conclude that loaning non-religious textbooks to all students, including those who attend a parochial school, establishes a religion or constitutes the use of public funds to aid religious schools (cf. *Everson* v. *Board of Educ.*, 330 U. S. 1, 16, 18).[2]

As a practical matter, to deny private school children the benefit of the State aid provided by section 701 could widen

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[2] Mr. Justice JACKSON, who dissented in *Everson*, objected to the statute there under consideration because it limited payments to the parents of public school or of *Catholic* school children. He said: "A policeman protects a Catholic, of course—but not because he is a Catholic; it is because he is a man and a member of society. The fireman protects the Church school—but not because it is a Church school; it is because it is property, part of the assets of our society. Neither the fireman nor the policeman has to ask before he renders aid 'Is this man or building identified with the Catholic Church?' But before these school authorities draw a check to reimburse for a student's fare they must ask just that question, and if the school is a Catholic one they may render aid because it is such, while if it is of any other faith or is run for profit, the help must be withheld." (330 U. S., *supra*, p. 25.) Subdivision 3 of section 701 of the Education Law asks no questions about what school the child attends, thus avoiding even the objection raised by Mr. Justice JACKSON in his *Everson* dissent.

the gap between those children in deprived areas who attend parochial schools and those attending public schools in the same areas who receive the benefits of all the many and necessary programs backed by the massive resources of both State and Federal Governments.

The order appealed from should be affirmed, without costs.

Dissenting Opinion

Van Voorhis, J. (dissenting). Plaintiff Boards of Education have, as it seems to us, capacity to sue. The cases holding that a public body has no standing to challenge a State statute restricting its governmental powers are not in point (e.g., *City of Buffalo* v. *State Bd. of Equalization*, 26 A D 2d 213; *County of Albany* v. *Hooker*, 204 N. Y. 1, 9-10; *Black Riv. Regulating Dist.* v. *Adirondack League Club*, 307 N. Y. 475, 487; *St. Clair* v. *Yonkers Raceway*, 13 N Y 2d 72, 76). The reasons for this conclusion are adequately stated in the opinion by Special Term and in the concurring opinion at the Appellate Division. These Boards of Education are not seeking to augment their powers by obtaining an adjudication that a statute is unconstitutional which purports to restrict their authority, but, instead, they are asking for a court determination (in the form of a declaratory judgment) concerning whether they are legally authorized to spend public money for purposes purporting to be authorized by this statute. If subdivision 3 of section 701 of the Education Law (as amd. by L. 1965, ch. 320, and L. 1966, ch. 795) is unconstitutional insofar as it authorizes the purchase of textbooks by school boards for loan to children enrolled in parochial schools, then the school boards would exceed their powers in making such expenditures. Upon the other hand, if that statute

is valid, as the State Commissioner of Education has ruled, any disobedient school board member becomes liable to removal from office (Education Law, §§ 306, 1706) and the Commissioner may withhold public moneys from any district whose school board disobeys the Commissioner's directive implementing the statute.

The right of a local Board of Education to sue the State Commissioner of Education has frequently been upheld including actions involving the question of constitutionality of State statutes. (*Matter of Board of Educ. of Cent. School Dist. No. 2* v. *Allen,* 14 A D 2d 429; *Matter of Bethlehem Union Free School Dist.* v. *Wilson,* 303 N. Y. 107; *Matter of Board of Educ. of Union Free School Dist. No. 3* v. *Allen,* 6 A D 2d 316, affd. 6 N Y 2d 871.)

This brings us to the question whether this statute violates section 3 of article XI of the New York State Constitution, which reads as follows: "Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning."

The last portion of this section, relating to the transportation of children, was added by special amendment to obviate the immediate impact of the decision in *Judd* v. *Board of Educ.* (278 N. Y. 200 [1938]). The *Judd* case held that this provision of the State Constitution was violated by the then section 206 of the Education Law insofar as it purported to authorize the use of public funds to pay

for the transportation of pupils to or from schools wholly or in part under the control or direction of religious denominations or in which religious doctrines or tenets were taught. The providing of schoolbooks for such schools touches more nearly what section 3 of article XI of the Constitution was designed to prohibit than the transportation of pupils by bus. The origin and purpose of this constitutional provision are discussed so thoroughly in the opinion of the court by Judge RIPPEY that we shall not repeat here what was said. It is argued here that in the *Judd* case, the expenditures were to be for the benefit of the parochial schools, whereas under this statute, they are for the pupil under the so-called child benefit theory. The court in the *Judd* case, however, cites and follows *Smith* v. *Donahue* (202 App. Div. 656) which held to be unconstitutional a construction of subdivision 4 of the then section 868 of the Education Law which would authorize Boards of Education to furnish free textbooks and other supplies to the children attending parochial schools. The Appellate Division, Third Department, there said (p. 664): "It seems to us to be giving a strained and unusual meaning to words if we hold that the books and the ordinary school supplies, when furnished for the use of pupils, is a furnishing to the pupils and not a furnishing in aid or maintenance of a school of learning. It seems very plain that such furnishing is at least indirectly in aid of the institution and that, if not in actual violation of the words, it is in violation of the true intent and meaning of the Constitution and in consequence equally unconstitutional. (*People ex rel. Bolton* v. *Albertson*, 55 N. Y. 50; *Matter of Hopper* v. *Britt*, 203 id. 144.)" The *Smith* case was, as above stated, cited with approval and followed in *Judd*.

Unless *Judd* and *Smith* be overruled, they are decisive of the present issue. It does not seem to us that any basic change has been wrought by the passage of time in the factors considered in *Judd* and *Smith*. The subject is controversial, and has been controversial in this country for over 200 years. It is unlikely that new developments have materially altered the basic considerations.

If this provision in the State Constitution were to be equated in these respects with the First Amendment to the Federal Constitution, it is by no means clear that the result would be different. It is true, to be sure, as stated by Justice JACKSON in *McCollum* v. *Board of Educ.* (333 U. S. 203, 238), that there are times when "the legal 'wall of separation between church and state' [becomes] as winding as the famous serpentine wall designed by Mr. Jefferson for the University he founded." Nevertheless, the tendency of the Supreme Court has been rather strict in maintaining this wall of separation for reasons eloquently stated many years ago by Madison and Jefferson (*Engel* v. *Vitale*, 370 U. S. 421; *Abington School Dist.* v. *Schempp*, 374 U. S. 203; *McCollum* v. *Board of Educ.*, 333 U. S. 203, *supra*). *Everson* v. *Board of Educ.* (330 U. S. 1, permitting payments for bus transportation) might have been decided differently today, inasmuch as it was decided five to four with Justice DOUGLAS in the majority. He later wrote in *Engel* v. *Vitale* (370 U. S. 421), at page 443, that "The *Everson* case seems in retrospect to be out of line with the First Amendment * * * Mr. Justice RUTLEDGE stated in dissent what I think is durable First Amendment philosophy".

These and other decisions by the Supreme Court seem to have outdistanced *Cochran* v. *Board of Educ.* (281 U. S. 370). The Supreme Court therein was not bound by the

First Amendment, which had not then been mandated on the States by the Fourteenth Amendment to the Federal Constitution, and the Louisiana court had held that there was no violation of the Louisiana Constitution (*Borden* v. *Louisiana State Bd. of Educ.*, 168 La. 1005). The furnishing of textbooks to the students of parochial schools was there sought to be restrained under the Fourteenth Amendment alone, as taking private property for a private purpose. The argument there prevailed that public aid was for the purchase of schoolbooks for the use of children rather than being for the school itself. This "student benefit theory" is hardly new, as respondents-intervenors assert that it is. It was overruled in this State in *Smith* v. *Donahue* (*supra*) and this court stated in the *Judd* case that the constitutionality of the Louisiana statute authorizing the appropriation of public funds for textbooks was decided under the Louisiana Constitution and "was not a Federal question" (278 N. Y., *supra*, pp. 213-214). Our opinion in *Judd* continued by stating: "The reasoning followed in the Louisiana State courts has been followed in no other case to which our attention has been called, but has been expressly disapproved in *State ex rel. Traub* v. *Brown, supra* [36 Del. 181, 187, writ of error dsmd. Feb. 15, 1938]."

This 1894 amendment (N. Y. Const., art. XI, § 3) has its roots in the early history of the State and belongs to "the long and intensive struggle for religious freedom in America", which Justice RUTLEDGE mentioned in his dissenting opinion in *Everson* v. *Board of Educ.* (330 U. S. 1, 33-34, *supra*) of which he said the First Amendment "was the direct culmination." Despite differences in phraseology, the object of both the First Amendment and this State amend-

ment is to keep religion from being dominated by government and to prevent government from being dominated by pressure groups seeking to control it for the promotion of religion.

If the books to be purchased by Boards of Education and supplied to pupils of parochial schools were religious tracts, it is conceded that the statute would be unconstitutional. The mere circumstance that they would be loaned to the pupil rather than supplied directly to the school would not preserve its validity. The constitutionality of this enactment is sought to be sustained on the basis that the textbooks to be supplied are "secular" rather than "religious". Counsel for respondents assume that the clause in the section which states that they "shall be textbooks which are designated in any public, elementary or secondary schools in the state or are approved by any boards of education, trustees or other school authorities" means that the same books that are furnished to children attending public schools shall be furnished children attending private schools. The language does not exactly say this but, even if it were so construed, that would not sustain its constitutionality. The difficulty is that there is no reliable standard by which secular and religious textbooks can be distinguished from each other. In his concurring opinion in *McCollum* v. *Board of Educ.* (333 U. S. 203, 235, *supra*) Justice JACKSON observed that: "Perhaps subjects such as mathematics, physics or chemistry are, or can be, completely secularized", but he continued by pointing out (p. 236) that it is necessary even in "preparation for a worldly life to know the roles that religion and religions have played" in the story of mankind, and that it is impossible to teach music, architecture, painting, history or literature without verging upon the religious field. One of

the most important reasons on account of which church communicants have chosen, with much financial sacrifice, to have their children taught in parochial schools, is that the have wanted them to be indoctrinated on these subjects with the church point of view. It would be too much to expect that were the church in control of public school instruction, textbooks would not be selected which present church interpretation of such historical, scientific or philosophic items, for example, as the Council of Trent, the Reformation, the Spanish Inquisition, the Encyclopedists, Astronomy (cf. Copernicus and Galileo), Evolution, Social Studies (e.g., birth control, divorce, abortion) or, to quote again from Justice JACKSON in *McCollum* (*supra*, p. 236), "even the New England effort to found 'a Church without a Bishop and a State without a King' * * *". The New Englanders succeeded, for a while, in creating one of the most absolute theocracies of all time. No doubt Jefferson and Madison had this in mind when they fashioned the First Amendment, as well as the grounds for rebellion of "Recusants" and "Dissenters" against the Church of England. "It is too much to expect that mortals will teach subjects about which their contemporaries have passionate controversies with the detachment they may summon to teaching about remote subjects such as Confucius or Mohammed. When instruction turns to proselyting and imparting knowledge becomes evangelism is, except in the crudest cases, a subtle inquiry." (*McCollum* v. *Board of Educ.*, 333 U. S. 203, 236, JACKSON, J., concurring.)

This has the most direct bearing upon the point presently at issue. If it were not true, church members who are compelled by law to pay taxes for public schools would not feel constrained by conscience and discipline to support religious schools for their own children. If the state is to provide

schoolbooks for instruction in "secular" fields, which have inseparable religious connotations, and parochial schools become increasingly dependent upon the state money to provide textbooks, which are the life blood of education, this statute will create and foster a pressure to dominate the choosing of books that shall be used in the public schools (so that they may be used also in parochial schools) which will always be latent, and at certain times and places, irresistible, and, as action begets reaction, there will be an opposite tendency, equally dangerous, on the part of the state to dominate the church.

As in the case of a trustee (e.g., *Matter of Hubbell*, 302 N. Y. 246, 259), the motivation of a religious group may be of the best, and its sense of mission the most disinterested, and yet—unless we are to change our governmental philosophy—the fundamental law will not permit it to be placed in a position where its own interest depends upon eroding the principle of separation between church and state.

The tendency on the part of the state to dominate the church has been observed in every totalitarian country, and it is actually what the First Amendment and article XI (§ 3) of the State Constitution were designed to prevent. The writings of James Madison, in particular, indicate that his concern for the separation between church and state was that he believed it to be as much in the interest of religion as of government.

If there were some applicable standard by which secular and religious textbooks could be distinguished from each other, there would remain the question whether taxpayers' money would be spent to buy necessaries for parochial schools, thus liberating funds to be spent upon more strictly religious objectives. We are not required now to determine the constitutionality of expenditures for school lunch

programs, health and welfare services, busing, or even scholarships in the case of higher education. Our present concern is solely with textbooks for children, which are at the heart of the educational process.

The order appealed from should be reversed and the order and judgment of the Supreme Court, Albany County, be reinstated.

Judges BURKE, BERGAN and KEATING concur with Judge SCILEPPI; Judge VAN VOORHIS dissents and votes to reverse in a separate opinion in which Chief Judge FULD and Judge BREITEL concur.

Orde affirmed.

SUPREME COURT

ALBANY COUNTY

Judgment on Remittitur

June 15, 1967

The above named appellants, the Boards of Education of the East Greenbush and Roslyn School Districts, having appealed to the Court of Appeals from an order of the Appellate Division of the Supreme Court, Third Judicial Department, entered in the office of the Clerk of that Court on the 6th day of January, 1967, reversing an order and judgment of Supreme Court, Albany County, entered in the office of the Albany County Clerk on the 30th day of August, 1966, holding Chapter 320 of the Laws of 1966, to be unconstitutional and void insofar as it provides for the purchase and loan of text books to pupils attending religious schools, said order of reversal having held that the plaintiffs had no standing to contest the constitutionality of an act of the State Legislature, and said appeal having been argued at a term of the Court of Appeals of the State of New York, commencing on February 14, 1967, by Marvin E. Pollock, Esq., of counsel for plaintiffs-appellants, and by Mrs. Jean M. Coon, of counsel for Louis J. Lefkowitz, Attorney General of the State of New York, attorney for defendant-respondent, and by Porter Chandler, Esq., of counsel for James J. MacKrell, Esq., attorney for intervenor-defendants-respondents, and briefs of amici curiae having been submitted, and after due deliberation, the said Court of Appeals, having handed down its decision, on June 1, 1967, affirming the order of the Appellate Division, three judges

dissenting, holding Chapter 320 of the Laws of 1966 constitutional in all respects, without costs,

And the original record and remittitur of the Court of Appeals having been filed in the Albany County Clerk's office, it is

ORDERED AND ADJUDGED that the order and judgment of Supreme Court, Albany County, entered August 30, 1966, be and the same hereby is reversed.

JOHN S. BARTLETT
Albany County Clerk

SUPREME COURT, U. S.

SEP 28 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 660

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT No. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACH, SAND LAKE and NORTH GREENBUSH, RENSSELAER COUNTY and CHATHAM, COLUMBIA COUNTY and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT No. 3, TOWNS OF NORTH HEMPSTEAD and OYSTER BAY, NASSAU COUNTY, NEW YORK,

Appellants,

—v.—

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York,

Appellee,

—and—

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH and BARBARA BRENNAN,

Intervenor-Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

MARVIN E. POLLOCK
Attorney for Appellants
80 Pine Street
New York, N. Y. 10005

Of Counsel:

ALAN H. LEVINE, Esq.
c/o New York Civil Liberties Union
156 Fifth Avenue
New York, N. Y. 10010

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. _____

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACH, SAND LAKE and NORTH GREENBUSH, RENSSELAER COUNTY and CHATHAM, COLUMBIA COUNTY and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3, TOWNS OF NORTH HEMPSTEAD and OYSTER BAY, NASSAU COUNTY, NEW YORK,

Appellants,

—v.—

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York,

Appellee,

—and—

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH and BARBARA BRENNAN,

Intervenor-Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

The Appellants, pursuant to Rules 13(2) and 15 of the Rules of the United States Supreme Court, file this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on direct appeal to review the final judgment in question, and should exercise such jurisdiction in this case.

Opinions Below

The majority and dissenting opinions delivered in the Court of Appeals of the State of New York are reported at 20 N.Y. 2d 109, 281 N.Y.S. 2d 799, 228 N.E. 2d 791. Copies of these opinions as well as the final judgment appealed from are set out in the Appendix, *infra,* pp. 21-36. The majority and concurring opinions of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department, are reported at 27 A.D. 2d 69, 276 N.Y.S. 2d 234. The opinion of the Supreme Court of the State of New York, Albany County, is reported at 51 Misc. 2d 297, 273 N.Y.S. 2d 239.

Jurisdiction

This appeal is from a final judgment of the Court of Appeals of the State of New York affirming the order of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department (7),* which order reversed the order and judgment of the Supreme Court of the State of New York, Albany County, declaring Section 701, subdivision 3, of the New York Education Law, as amended by Chapter 320 of the New York Laws of 1965 and Chapter 795 of the New York Laws of 1966, 16 McKinney's Consol. Laws of New York, §701.3, insofar as it provides for the purchase of textbooks with public moneys for free loan to pupils enrolled in religious schools, in violation of Article XI, Section 3 of the New York State Constitution and the Establishment & Free Exercise Clauses of the First Amendment to the Constitution of the United States (75) and dismissed the complaint (85).

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* References are to pages of Transcript of Record unless otherwise indicated.

The final judgment appealed from was entered on June 15, 1967 (7). Notice of Appeal was filed with the Supreme Court of the State of New York, Albany County, on August 17, 1967 (1).

The Supreme Court of the United States has jurisdiction to review the judgment by direct appeal under 28 U.S.C. §1257(2).

The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Zorach* v. *Clauson*, 343 U.S. 306 (1952); *Illinois ex rel. McCollum* v. *Board of Education of School District No. 71, Champaign County, Illinois, et al.*, 333 U.S. 203 (1948); *Everson* v. *Board of Education*, 330 U.S. 1 (1946).

Statute Involved

Section 701, subdivision 3, of the New York Education Law, as amended L. 1965, C. 320, §2; L. 1966, C. 795, 16 McKinney's Consol. Laws of New York, §701.3,

> "In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of

the state or are approved by any boards of education, trustees, or other school authorities."

Questions Presented

(1) Whether Section 701.3 of the New York Education Law, insofar as it provides for the purchase of textbooks with public moneys for free loan to pupils enrolled in grades 7 to 12 of schools wholly or in part under the control or direction of religious denominations, or in which denominational tenets or doctrines are taught, violates the Establishment Clause of the First Amendment to the Constitution of the United States of America?

(2) Whether Section 701.3 of the New York Education Law, insofar as it provides for the purchase of textbooks with public moneys for free loan to pupils enrolled in grades 7 to 12 of schools wholly or in part under the control or direction of religious denominations, or in which denominational tenets or doctrines are taught, violates the Free Exercise Clause of the First Amendment to the Constitution of the United States of America?

Statement of the Case

Prior to 1965, Section 701 of the New York Education Law authorized school boards to purchase textbooks and either sell or rent them to pupils attending public schools. In 1965, by Chapter 320 of the Laws of 1965, Section 701 was amended to provide, effective September 1, 1966, that school boards must purchase textbooks with public moneys and loan them free, not only to pupils attending public schools, but also to pupils enrolled in any private school which complies with the State's compulsory education law. As originally enacted, new Section 701 did not contain any limit either as to the number of textbooks required to

be purchased and loaned or the amount of public money required to be expended therefor. However, it did direct the Commissioner of Education, in addition to the annual apportionment of public moneys pursuant to the Education Law, to apportion to each school district an amount equal to the cost of the textbooks so purchased and loaned, but not more than $10 a pupil. After the initiation of this action, by Chapter 795 of the Law of 1966, the Legislature amended Section 701 again in order to reduce the financial burden imposed on local school boards by the law.

Before taking office, each member of the plaintiff school boards took an oath, prescribed by Article XIII, Section 1 of the New York State Constitution, to support the Constitutions of the United States and the State of New York. Sections 306 and 1706 of the Education Law provide that any school board member who fails to comply with any section of the Education Law is subject to removal from office by the Commissioner of Education. Section 306 of the Education Law also provides that the Commissioner of Education may withhold public moneys from any school district whose school board fails to comply with any section of the Education Law.

There are pupils residing in the plaintiffs' school districts who are enrolled in grades seven through twelve of religious schools which comply with the compulsory education law.

In the view of the plaintiff school boards, new Section 701, as amended ("Textbook Loan Law") was repugnant to both the New York State and United States Constitutions insofar as it applied to pupils attending religious schools. Faced with the choice of either violating their oaths of office

or refusing to implement the law thereby incurring the grave sanctions imposed for non-compliance, on April 29, 1966, the plaintiff East Greenbush school board commenced this action in the Supreme Court of the State of New York, Albany County. The relief sought in the complaint as amended was a judgment declaring the Textbook Loan Law, insofar as it mandated the purchase of textbooks with public moneys for free loan to pupils attending religious schools, in violation of Article XI, Section 3 of the New York State Constitution and the First Amendment to the United States Constitution, and restraining the defendant from implementing the law (29).

The answer, in substance, admitted the facts pleaded in the complaint as amended, but denied the allegations of unconstitutionality of the law. In addition, the answer alleged five affirmative defenses, one of which was that the plaintiff lacked standing to maintain the action (37).

After issue was joined, five parents of pupils who resided in the school district of the plaintiff East Greenbush school board and who were enrolled in a grade from seven through twelve of a parochial school moved for leave to intervene (44). Their motion was granted without opposition and an order of intervention was entered on May 27, 1966 (52). In their answer, the intervenors denied the allegations of the complaint relating to the unconstitutionality of the law and alleged three affirmative defenses. The substance of these affirmative defenses was that to forbid the loan of textbooks to pupils attending religious schools while permitting the loan of such books to pupils attending non-sectarian private schools would be an interference with the free exercise of religion and a denial of equal protection and due process in violation of the First and Fourteenth

Amendments to the United States Constitution and Article 1, Sections 3 and 11 of the New York State Constitution (54).

All parties then moved for judgment (40, 42 and 59). The motions were argued on July 8, 1966. At the time of oral argument, the Board of Education of Union Free School District No. 3, Towns of North Hempstead and Oyster Bay, Nassau County, moved to join the action as plaintiff. Its motion was granted and an order was entered to that effect on August 2, 1966 (61).

The Supreme Court, Albany County, by decision dated August 18, 1966, found that the plaintiffs had standing to maintain the action and that the other affirmative defenses were without foundation. It also found that the Textbook Loan Law, to the extent it mandated the purchase of textbooks for free loan to pupils attending religious schools, violated Article XI, Section 3 of the New York State Constitution and both the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution (63). An order and judgment in accordance with the decision was entered on August 30, 1966 (75). On the same day, the defendant and the intervenors filed notices of appeal (79, 81).

On appeal, the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, reversed the judgment and order of the Supreme Court, Albany County, and dismissed the complaint (85). Three justices, constituting the majority, decided the appeal solely on the ground that the plaintiffs did not have standing to bring the action (88). Two justices concurred in the result but decided the appeal on the merits (90). They

found first that the plaintiffs possessed the requisite standing to sue and then went on to hold that the Textbook Loan Law did not violate Article XI, Section 3 of the New York State Constitution or the Religion Clauses of the First Amendment to the United States Constitution.

On January 12, 1967, the plaintiffs appealed (83) from the order of reversal of the Appellate Division which was entered on January 6, 1967 (85).

The appeal was argued on March 2, 1967. By decision dated June 1, 1967, the Court of Appeals, by a vote of 4-3, affirmed the order of reversal of the Appellate Division, Third Judicial Department, holding that the plaintiffs had the requisite legal standing to sue and also holding that the Textbook Loan Law did not violate Article XI, Section 3 of the New York State Constitution or the Establishment Clause of the First Amendment to the United States Constitution (13). Remittitur was entered on June 1, 1967 (9) and Judgment on Remittitur was entered on June 15, 1967 (7).

How the Federal Questions Are Presented

The complaint as amended alleged that insofar as it provided for the purchase of textbooks with public moneys for free loan to pupils attending religious schools the Textbook Loan Law violated the First Amendment to the United States Constitution made applicable to the State of New York by the Fourteenth Amendment, and prayed for a declaratory judgment to that effect (29).

The decision of Supreme Court, Albany County was that to the extent it provided for the free loan of textbooks to pupils attending religious schools the Textbook Loan Law

violated both the Establishment and Free Exercise Clauses of the First Amendment (63), and an order and judgment was entered to that effect (75).

On appeal to the Appellate Division, the respondents argued that the Textbook Loan Law did not violate the First Amendment in any respect. The Appellate Division reversed the judgment and order of Supreme Court, Albany County, but did not pass on the federal constitutional questions. The appeal was decided on the sole ground that the appellants did not have standing to bring the action (88).

On appeal to the Court of Appeals, the appellants argued that the Textbook Loan Law violated both the Establishment and Free Exercise Clauses of the First Amendment. The Court of Appeals, after holding that the appellants did have the requisite standing to maintain the action, held that the Textbook Loan Law did not violate the Establishment Clause and made no ruling with respect to the Free Exercise Clause (13).

The Questions Are Substantial

In *Everson* v. *Board of Education*, 330 U.S. 1 (1947), the Supreme Court was called upon for the first time to interpret the Establishment Clause of the First Amendment. At issue was a New Jersey statute permitting local school boards to provide transportation for students attending religious schools. While upholding the law, the Supreme Court warned that the law approached the verge of the State's constitutional power.

Even assuming *Everson* represents the current thinking of the Supreme Court, and later cases indicate there is

some doubt it does, the question raised by this case is whether a State may go beyond bus transportation and provide pupils in parochial school with the cost of textbooks. Since textbooks are as essential to education as any other element, the answer to this question will have a wide impact. Depending on the answer, a State will either be prohibited from providing any further aid to parochial school children or it will be permitted to assume the entire cost of parochial school education. It is submitted that once a State is constitutionally permitted to assume the cost of textbooks for pupils in parochial school no basis will thereafter exist for preventing it from assuming the cost of other essential elements of parochial education, such as school supplies, equipment, athletic facilities, libraries, teachers and even school buildings.

In addition to New York, there are now six states with laws permitting textbooks to be loaned to children attending parochial school. La. Rev. Stat. Tit. 17, §351 (1963); Miss. Code Ann. 1942, Tit. 24, §6656 (1952); General Laws of Rhode Island, 1956 §16-23-2 (Supp. 1965),* W. Va. Code Ann. §18-5-21b (1966); Burns Indiana Stat. Ann. 1933, §28-512 (1948); Kansas Stat. Ann. §72-4107 (1964). In three other states, the practice of providing textbooks for parochial school students has been held to violate the respective state constitutions. *Dickman* v. *School District No. 626,* 232 Ore. 238, 366 P. 2d 533 (1962); *Zellers* v. *Huff,* 55 N. M. 501, 236 P. 2d 949 (1951); *Hass* v. *Independent School District,* 69 S.D. 303, 9 N.W. 2d 707 (1943). The Supreme Court has never directly considered whether the Establishment Clause forbids a state from providing such

* There is currently pending a suit to declare this act unconstitutional as being repugnant to the First Amendment. *Bowerman* v. *O'Conner, Jr.,* Providence Co. Superior Court, #31775 (1966).

aid to students in parochial schools. It is one thing to compel taxpayers to contribute to the support of a public school system where children receive their education in an atmosphere free of sectarian influence. It is quite another thing to require them to support a school system in which sectarian influence is a primary consideration.

The magnitude of the problem can be seen by viewing the use of the taxing power to support religious schools against the background of the growth of sectarian education. Private school attendance has increased to such an extent that today there are approximately seven million students, or approximately 1/8 of the school population, enrolled in private schools, most of which are sectarian in character. Between 1952 and 1963 the population of Catholic elementary and secondary schools alone increased by over 59.9% and 90.4% respectively. At the same time, enrollment in public schools increased at a much slower pace. National Catholic Welfare Conference, *Summary of Catholic Education 1962 and 1963* 32, 42 (1965).

In upholding the Textbook Loan Law, the Court of Appeals said that since the books are loaned to pupils there is no intention to aid parochial schools as such. But in the very next breath the Court was forced to admit that nevertheless there are benefits accruing to those schools. This should have put an end to the matter since any indirect aid, no matter how small, is prohibited. The Court, however, was intent on preserving the law. To this end, the Court created a new category of aid called "collateral" aid which in some undescribed way differs from indirect aid. Thus, as if by magic, illegal indirect aid was transformed into legal aid (Appendix, p. 24).

After going through these verbal machinations, the Court of Appeals had no difficulty concluding that loaning books to parochial school students does not establish a religion or constitute the use of public funds to aid religious schools in violation of the First Amendment (Appendix, p. 25). Only one case was cited in support of this conclusion, and that was *Everson*. No other case, either before or after *Everson*, was even mentioned, not even *Cochran* v. *Board of Education*, 281 U.S. 370 (1930), which the appellees had argued was decisive. Evidently, the Court agreed with the appellants that *Cochran* had no application.

In *Cochran*, a number of citizens and taxpayers of Louisiana sued to restrain state officers from spending public funds for the purchase of textbooks for students attending religious schools on the ground that the laws authorizing such expenditure were repugnant to the State Constitution and Article IV, Section 4 and the due process clause of the Fourteenth Amendment of the Federal Constitution. No argument was made that the laws in question violated the First Amendment. Indeed the Supreme Court had not yet determined that the Establishment Clause of the First Amendment was applicable to the States,* nor had it even interpreted the Establishment Clause as it later would in *Everson*. Accordingly, the Supreme Court decided the case on due process grounds alone. All the case stands for then is that a law appropriating money for textbooks for parochial students does not constitute a taking of private property for a private purpose.

It is to be remembered that in *Everson* the Court said that a busing law approached the verge of the State's constitutional power. While a busing law involves aid some-

* Such a determination was made 10 years later in *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940).

what removed from the classroom, aid in the form of free textbooks is intimately connected with the educational process itself. It is possible to read *Everson* as saying that the aid there was constitutionally permissible because all the law did was to provide a safe way to get to school. In short, the law was a safety measure and as such served a valid public purpose. If *Everson* means that and nothing more, it is of no help here. For here, it cannot be argued that the Textbook Loan Law is a safety device. If, however, *Everson* means something more, then guidelines are necessary, without which doubt will continue to persist as to the extent of the State's power to aid students in parochial schools. More than 20 years have elapsed since *Everson*. During that time, there have been substantial changes both in the quality and extent of public and private school education. These changes make it all the more important to come to grips now with the issues raised in this case, for these issues go to the very heart of public education and the principle of separation of church and state.

In his dissent in *Everson,* Justice Rutledge wrote, with prophetic insight:

> "New Jersey's statute sustained is the first, if indeed it is not the second breach, to be made by this Court's action. That a third, and a fourth, and still others will be attempted, we may be sure. For just as *Cochran* v. *Board of Education,* 281 U.S. 370, has opened the way by oblique ruling for this decision, so will the two make wider the breach for a third. Thus with time the most solid freedom steadily gives way before continuing corrosive decision." (330 U.S. at p. 29)
>
> "(A)part from efforts to inject religious training or exercises and sectarian issues into the public schools,

> the only serious surviving threat to maintaining that complete and permanent separation of religion and civil power which the First Amendment commands is through use of the taxing power to support religion, religious establishments, or establishments having a religious foundation, whatever their form or special religious function." (330 U.S. at p. 44)

To Justice Rutledge, the prohibition of the Establishment clause was clear.

> "The prohibition broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes." (330 U.S. at p. 33)

Turning to the facts of the case before him, Justice Rutledge argued (and the argument applies with like force to the providing of textbooks) that the primary reason children were sent to parochial school was to receive religious training and teaching. Payment of transportation costs not only helped the children get to school and the parents to send them, but it aided them in this objective and was therefore aid to religion. Any aid to religion, he said, was intended by the framers of the First Amendment to be outlawed as constituting an establishment. He urged the Court to declare that government must be neutral toward religion.

Justice Rutledge's reasoning was again advanced by the *Everson* dissenters in *McCollum* v. *Board of Education*, 333 U.S. 203 (1947), but it still failed to win acceptance by one more justice to make it a majority view. The Court nevertheless found that a released time system involved a

utilization of the tax established and tax-supported public school system to aid religious groups to spread their faith and therefore constituted an establishment of religion. In *Engel* v. *Vitale*, 370 U.S. 421 (1962), which involved a challenge to the New York Regent's prayer, Justice Rutledge's views seemingly prevailed. There, Justice Douglas, a member of the *Everson* majority, began his concurring opinion with the flat statement that government financing of religious exercises "is an unconstitutional undertaking whatever form it takes", and he went on to say:

> "My problem today would be uncomplicated but for *Everson* v. *Board of Education*. The *Everson* case seems in retrospect to be out of line with the First Amendment . . . Mr. Justice Rutledge stated in dissent what I think is durable First Amendment philosophy." (370 U.S. at p. 443)

Mr. Justice Douglas had another opportunity to reiterate these views in his concurring opinion in the Bible reading cases, *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 229 (1962), where even the majority seemed to adopt Justice Rutledge's reasoning.

Plainly, doubt has been cast on the precedent value of the majority's reasoning in *Everson* and in turn on the decision itself.* In order to stem the tide of government financing of parochial education, what is needed now is a firm expression from the present court that all govern-

* It is worth noting that a number of cases have been instituted recently with the view of overturning *Everson*. Coincidentally, the most recent one was filed on September 7, 1967 in New Jersey, the state from which *Everson* arose. *McCenna, et al.* v. *Sills, et al.*, New Jersey Superior Court, Bergen County, Chancery Division, Calendar No. C-17-67.

ment aid to religious schools, whatever form it takes, is outlawed.

Justice Kane of the Supreme Court and Justice Van Voorhis of the Court of Appeals both felt that the Textbook Loan Law also raised fundamental questions with respect to the Free Exercise Clause. The law itself provides that the books to be loaned shall be those "which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities." The respondents argued in the courts below that this language means that the same books that are furnished to children attending public schools shall be furnished to children attending private schools.

In his dissenting opinion in the Court of Appeals, Justice Van Voorhis observed that: "the language does not exactly say this." (Appendix, p. 31) But, he said, even putting this doubt aside, the difficulty is that there is no reliable method by which secular and religious textbooks can be distinguished from each other. He noted that respondents conceded in the Court of Appeals that if the books to be loaned were religious tracts, the law would be unconstitutional, whether the books were loaned to the students or to the schools themselves. But how, he asked, does one determine whether a book is religious or secular? Some subjects, such as the physical sciences, are or can be secularized. But what about courses in history, social studies and the like? According to Justice Van Voorhis, one of the primary reasons why pupils are sent to church schools is to be indoctrinated in these subjects with the church point of view. Like Justice Jackson, in his concurring opinion in *McCollum* (333 U.S. at p. 236), he

felt it would be too much to expect that were the church in control of public school instruction, it would not select textbooks which present the church point of view on these subjects.

Justice Kane and Judge Van Voorhis both expressed the view that since the increased demand for government to assume the cost of textbooks for parochial school students has resulted from financial considerations, it is to be expected that if the State does assume such cost the religious schools will begin to rely upon the assistance of public moneys for textbooks and anticipate this reliance in the preparation of their budgets. As church schools become increasingly dependent on state textbook aid, the Textbook Loan Law will, they say, create and foster a pressure to influence or dominate the selection of books to be used in the public schools, for presumably these books are the same books that are to be used in the parochial schools. Church schools of one persuasion will thus be forced to vie with church groups of other persuasions to insure that their message is the one disseminated throughout the school systems.

The two justices also expressed the concern that if the church schools become dependent on government for textbooks, the government will be in a unique position to control instruction in church schools. Thus, church schools may well find themselves having to accept textbooks which are offensive to them (51 Misc. 2d at p. 303; Appendix, p. 33). It is just this sort of compulsion that the Free Exercise Clause was designed to prohibit. As Justice Clark said in *Abington School Dist.*:

> "The Free Exercise Clause . . . withdraws from legislative power . . . the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by the civil authority" (374 U.S. at p. 222).

The Textbook Loan Law makes control of the authority empowered to select the books the goal of every church interested in the survival and extension of its own school system. Those opposed to church involvement in education have a like stake in control. Whichever group prevails will have the power to use state machinery to interfere with the free exercise of religion by the losers. Viewed in this light, the Textbook Loan Law operates no differently than the laws considered in *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940), *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943), *Torcaso* v. *Watkins,* 367 U.S. 488 (1961) and *Scherbert* v. *Verner,* 374 U.S. 398 (1963), and should be condemned for the same reasons.

CONCLUSION

For the reasons heretofore stated, it is respectfully submitted that this Court has jurisdiction of this appeal under 28 U. S. C. §1257(2).

Respectfully submitted,

MARVIN E. POLLOCK
Attorney for Appellants

ALAN H. LEVINE, Esq.
Of Counsel

APPENDIX

Opinion, Judgment and Dissenting Opinion of Court of Appeals

Board of Education of Central School District No. 1, Towns of East Greenbush, Nassau, Schodack, Sand Lake & North Greenbush, Rensselaer County and Chatham, Columbia County, et al., Appellants v. James E. Allen, Jr., as Commissioner of Education of the State of New York, Respondent, and Michael Rock, et al., Intervenors-Respondents.

Decided June 1, 1967

Scileppi, J. Section 1 of chapter 320 of the Laws of 1965 provides in part: "It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state." (L. 1965, ch. 320, § 1.)

In keeping with this declaration of policy, the Legislature enacted subdivision 2 (renum. subd. 3 by L. 1966, ch. 795) of section 701 of the Education Law permitting the appropriate school authorities "to purchase and to loan upon individual request, to all children * * * who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, textbooks. Textbooks loaned to children enrolled in grades seven to twelve of said private schools shall be textbooks which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities. Such

textbooks are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities."

Plaintiffs seek judgment that this statute violates both the State and Federal Constitutions (N. Y. Const., art. XI, § 3; U. S. Const., 1st and 14th Amdts.). The defendant Commissioner of Education and the intervenors-defendants, parents of children residing in plaintiffs' school district who attend parochial schools, moved for dismissal of the complaint for failure to state a cause of action or for summary judgment declaring the statute constitutional. The plaintiff Boards of Education cross-moved for summary judgment declaring the statute unconstitutional.

Special Term denied all defendants' motions and granted plaintiffs' cross motion, holding that the plaintiffs had standing to sue; that the statute contravenes section 3 of article XI of the State Constitution (the "Blaine Amendment"); and that the statute violates the establishment and free exercise clauses of the First Amendment.

The Appellate Division reversed upon the ground that the plaintiffs had no standing.

Since we must reach the merits in this case,[1] we come to the question whether this statute violates section 3 of article XI of the New York State Constitution: "Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or

[1] The writer and Judges BURKE and BERGAN agree with the Appellate Division majority that plaintiffs have no standing. Judge KEATING, who is for affirmance on the merits, agrees with the dissenters that plaintiffs do have standing.

institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning."

The last portion of this section, relating to the transportation of children, was added by special amendment to obviate the decision in *Judd* v. *Board of Educ.* (278 N. Y. 200 [1938]).

In *Judd,* this court by a vote of four to three declared that a law which provided for school busing of parochial school children could not be sustained because it constituted indirect aid to schools which was in violation of the Blaine Amendment. *Judd* determined that, although school busing was primarily for the benefit of the child, it still had the effect of giving an incidental benefit to sectarian schools and thus ran afoul of section 3 of article XI prohibiting indirect aid. It is now argued that the statute before the court providing for textbooks loans to all children, including those attending parochial schools, must be unconstitutional for the same reason. We cannot agree with the reasoning of the majority in the *Judd* case and accordingly hold that it should not be followed. The New York State Constitution prohibits the use of public funds for a particular purpose; that is, aiding religiously affiliated schools. Certainly, not every State action which might entail some ultimate benefit to parochial schools is proscribed. Examples of co-operation between State and church are too familiar to require cataloguing here. As we said, although in a different context: "It is thus clear beyond cavil that the Constitution does not demand that every friendly gesture between church and State shall be discountenanced. The so-called 'wall of separation' may be built so high and

so broad as to impair both State and church, as we have come to know them". (*Matter of Zorach* v. *Clausen,* 303 N.Y. 161, 172, affd. 343 U.S. 306.) The architecture reflected in *Judd* would impede every form of legislation, the benefits of which, in some remote way, might inure to parochial schools. It is our view that the words "direct" and "indirect" relate solely to the means of attaining the prohibited end of aiding religion as such.

The purpose underlying section 701, found in the Legislature's own words (L. 1965, ch. 320, §1, *supra*), belies any interpretation other than that the statute is meant to bestow a public benefit upon all school children, regardless of their school affiliations. There can be no serious suggestion that the declaration of purpose by the Legislature was a verbal smoke screen designed to obscure a nefarious scheme to circumvent the New York State Constitution. No one in the last third of the 20th Century can doubt that a program aimed at improving the quality of education in all schools is a matter of legitimate State concern.

Since there is no intention to assist parochial schools as such, any benefit accruing to those schools is a collateral effect of the statute, and, therefore, cannot be properly classified as the giving of aid directly or indirectly.

Only textbooks designated for use by the public schools or approved by Boards of Education, trustees or school authorities may be lent (Education Law, §701, subd. 3). The State and local governments have long provided public libraries with books for use by all persons. It is not uncommon for schools, public and private alike, to assign various "outside readings" to pupils. Children often, then, fulfill assignments for courses in both public and private schools by means of using and borrow-from public libraries. We do not consider this indirect aid to private or parochial schools.

At a time when we have large-scale Federal and State aid to education, it is justly feared that children who are denied these benefits may receive education inferior to children in public schools. Unless certain types of aid can be made available to *all* children, we run the risk of creating an educational lag between children in public and private schools. We cannot perpetuate an erroneous interpretation of the State Constitution merely because it is contained in the reports of this court.

Having decided that section 701 entails no aid to the parochial schools, we thus hold that there is no Federal constitutional question under the establishment clause of the First Amendment. The State makes no affirmation of religious beliefs or activities within the public schools. Section 701 remains completely neutral with respect to religion, merely making available secular textbooks at the request of the individual student and asking no question about what school he attends. Despite the flexibility of the English language, it is impossible to conclude that loaning nonreligious textbooks to all students, including those who attend a parochial school, establishes a religion or constitutes the use of public funds to aid religious schools (cf. *Everson* v. *Board of Educ.*, 330 U. S. 1, 16, 18).[2]

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[2] Mr. Justice JACKSON, who dissented in *Everson*, objected to the statute there under consideration because it limited payments to the parents of public school or of *Catholic* school children. He said: "A policeman protects a Catholic, of course—but not because he is a Catholic; it is because he is a man and a member of society. The fireman protects the Church school—but not because it is a Church school; it is because it is property, part of the assets of our society. Neither the fireman nor the policeman has to ask before he renders aid 'Is this man or building identified with the Catholic Church?' But before these school authorities draw a check to reimburse for a student's fare they must ask just that question, and if the school is a Catholic one they may render aid because it is such, while if it is of any other faith or is run for profit, the help must be withheld."

As a practical matter, to deny private school children the benefit of the State aid provided by section 701 could widen the gap between those children in deprived areas who attend parochial schools and those attending public schools in the same areas who receive the benefits of all the many and necessary programs backed by the massive resources of both State and Federal Governments.

The order appealed from should be affirmed, without costs.

VAN VOORHIS, J. (dissenting). Plaintiff Boards of Education have, as it seems to us, capacity to sue. The cases holding that a public body has no standing to challenge a State statute restricting its governmental powers are not in point (e.g., *City of Buffalo* v. *State Bd. of Equalization*, 26 A D 2d 213; *County of Albany* v. *Hooker*, 204 N. Y. 1, 9-10; *Black Riv. Regulating Dist.* v. *Adirondack League Club*, 307 N. Y. 475, 487; *St. Clair* v. *Yonkers Raceway*, 13 N Y 2d 72, 76). The reasons for this conclusion are adequately stated in the opinion by Special Term and in the concurring opinion at the Appellate Division. These Boards of Education are not seeking to augment their powers by obtaining an adjudication that a statute is unconstitutional which purports to restrict their authority, but, instead, they are asking for a court determination (in the form of a declaratory judgment) concerning whether they are legally authorized to spend public money for purposes purporting to be authorized by this statute. If subdivision 3 of section 701 of the Education Law (as amd. by L. 1965, ch. 320, and L. 1966, ch. 795) is unconstitutional insofar as

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(330 U. S., *supra*, p. 25.) Subdivision 3 of section 701 of the Education Law asks no questions about what school the child attends, thus avoiding even the objection raised by Mr. Justice JACKSON in his *Everson* dissent.

it authorizes the purchase of textbooks by school boards for loan to children enrolled in parochial schools, then the school boards would exceed their powers in making such expenditures. Upon the other hand, if that statute is valid, as the State Commissioner of Education has ruled, any disobedient school board member becomes liable to removal from office (Education Law, §§306, 1706) and the Commissioner may withhold public moneys from any district whose school board disobeys the Commissioner's directive implementing the statute.

The right of a local Board of Education to sue the State Commissioner of Education has frequently been upheld including actions involving the question of constitutionality of State statutes. (*Matter of Board of Educ. of Cent. School Dist. No. 2* v. *Allen,* 14 A D 2d 429; *Matter of Bethlehem Union Free School Dist.* v. *Wilson,* 303 N. Y. 107; *Matter of Board of Educ. of Union Free School Dist. No. 3* v. *Allen,* 6 A D 2d 316, affd. 6 N Y 2d 871.)

This brings us to the question whether this statute violates section 3 of article XI of the New York State Constitution, which reads as follows: "Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning."

The last portion of this section, relating to the transportation of children, was added by special amendment to obviate the immediate impact of the decision in *Judd*

v. *Board of Educ.* (278 N. Y. 200 [1938]). The *Judd* case held that this provision of the State Constitution was violated by the then section 206 of the Education Law insofar as it purported to authorize the use of public funds to pay for the transportation of pupils to or from schools wholly or in part under the control or direction of religious denominations or in which religious doctrines or tenets were taught. The providing of schoolbooks for such schools touches more nearly what section 3 of article XI of the Constitution was designed to prohibit than the transportation of pupils by bus. The origin and purpose of this constitutional provision are discussed so thoroughly in the opinion of the court by Judge RIPPEY that we shall not repeat here what was said. It is argued here that in the *Judd* case, the expenditures were to be for the benefit of the parochial schools, whereas under this statute, they are for the pupil under the so-called child benefit theory. The court in the *Judd* case, however, cites and follows *Smith* v. *Donahue* (202 App. Div. 656) which held to be unconstitutional a construction of subdivision 4 of the then section 868 of the Education Law which would authorize Boards of Education to furnish free textbooks and other supplies to the children attending parochial schools. The Appellate Division, Third Department, there said (p. 664): "It seems to us to be giving a strained and unusual meaning to words if we hold that the books and the ordinary school supplies, when furnished for the use of pupils, is a furnishing to the pupils and not a furnishing in aid or maintenance of a school of learning. It seems very plain that such furnishing is at least indirectly in aid of the institution and that, if not in actual violation of the words, it is in violation of the true intent and meaning of the Constitution and in consequence equally unconstitutional. (*People ex rel. Bol-*

ton v. *Albertson,* 55 N. Y. 50; *Matter of Hopper* v. *Britt,* 203 id. 144.)" The *Smith* case was, as above stated, cited with approval and followed in *Judd.*

Unless *Judd* and *Smith* be overruled, they are decisive of the present issue. It does not seem to us that any basic change has been wrought by the passage of time in the factors considered in *Judd* and *Smith.* The subject is controversial, and has been controversial in this country for over 200 years. It is unlikely that new developments have materially altered the basic considerations.

If this provision in the State Constitution were to be equated in these respects with the First Amendment to the Federal Constitution, it is by no means clear that the the result would be different. It is true, to be sure, as stated by Justice JACKSON in *McCollum* v. *Board of Educ.* (333 U. S. 203, 238) that there are times when "the legal 'wall of separation between church and state' [becomes] as winding as the famous serpentine wall designed by Mr. Jefferson for the University he founded." Nevertheless, the tendency of the Supreme Court has been rather strict in maintaining this wall of separation for reasons eloquently stated many years ago by Madison and Jefferson (*Engel* v. *Vitale,* 370 U. S. 421; *Abington School Dist.* v. *Schempp,* 374 U. S. 203; *McCollum* v. *Board of Educ.,* 333 U. S. 203, *supra*). *Everson* v. *Board of Educ.* (330 U. S. 1, permitting payments for bus transportation) might have been decided differently today, inasmuch as it was decided five to four with Justice DOUGLAS in the majority. He later wrote in *Engel* v. *Vitale* (370 U. S. 421), at page 443, that "The *Everson* case seems in retrospect to be out of line with the First Amendment * * * Mr. Justice RUTLEDGE stated in dissent what I think is durable First Amendment philosophy".

These and other decisions by the Supreme Court seem to have outdistanced *Cochran* v. *Board of Educ.* (281 U. S. 370). The Supreme Court therein was not bound by the First Amendment, which had not then been mandated on the States by the Fourteenth Amendment to the Federal Constitution, and the Louisiana court had held that there was no violation of the Louisiana Constitution (*Borden* v. *Louisiana State Bd. of Educ.*, 168 La. 1005). The furnishing of textbooks to the students of parochial schools was there sought to be restrained under the Fourteenth Amendment alone, as taking private property for a private purpose. The argument there prevailed that public aid was for the purchase of schoolbooks for the use of children rather than being for the school itself. This "student benefit theory" is hardly new, as respondents-intervenors assert that it is. It was overruled in this State in *Smith* v. *Donahue* (*supra*) and this court stated in the *Judd* case that the constitutionality of the Louisiana statute authorizing the appropriation of public funds for textbooks was decided under the Louisiana Constitution and "was not a Federal question." (278 N. Y. *supra*, pp. 213-214.) Our opinion in *Judd* continued by stating: "The reasoning followed in the Louisiana State courts has been followed in no other case to which our attention has been called, but has been expressly disapproved in *State ex rel. Traub* v. *Brown*, *supra* [36 Del. 181, 187, writ of error dsmd. Feb. 15, 1938]."

This 1894 amendment (N. Y. Const., art. XI, § 3) has its roots in the early history of the State and belongs to "the long and intensive struggle for religious freedom in America", which Justice RUTLEDGE mentioned in his dissenting opinion in *Everson* v. *Board of Educ.* (330 U. S. 1, 33-34, *supra*) of which he said the First Amendment "was the direct culmination." Despite differences in phraseology,

the object of both the First Amendment and this State amendment is to keep religion from being dominated by government and to prevent government from being dominated by pressure groups seeking to control it for the promotion of religion.

If the books to be purchased by Boards of Education and supplied to pupils of parochial schools were religious tracts, it is conceded that the statute would be unconstitutional. The mere circumstance that they would be loaned to the pupil rather than supplied directly to the school would not preserve its validity. The constitutionality of this enactment is sought to be sustained on the basis that the textbooks to be supplied are "secular" rather than "religious." Counsel for respondents assume that the clause in the section which states that they "shall be textbooks which are designated in any public, elementary or secondary schools in the state or are approved by any boards of education, trustees or other school authorities" means that the same books that are furnished to children attending public schools shall be furnished children attending private schools. The language does not exactly say this but, even if it were so construed, that would not sustain its constitutionality. The difficulty is that there is no reliable standard by which secular and religious textbooks can be distinguished from each other. In his concurring opinion in *McCollum* v. *Board of Educ.* (333 U. S. 203, 235, *supra*) Justice JACKSON observed that: "Perhaps subjects such as mathematics, physics or chemistry are, or can be, completely secularized", but he continued by pointing out (p. 236) that it is necessary even in "preparation for a worldly life to know the roles that religion and religions have played" in the story of mankind, and that it is impossible to teach music, architecture, painting, his-

tory or literature without verging upon the religious field. One of the most important reasons on account of which church communicants have chosen, with much financial sacrifice, to have their children taught in parochial schools, is that they have wanted them to be indoctrinated on these subjects with the church point of view. It would be too much to expect that were the church in control of public school instruction, textbooks would not be selected which present church interpretation of such historical, scientific or philosophic items, for example, as the Council of Trent, the Reformation, the Spanish Inquisition, the Encyclopedists, Astronomy (cf. Copernicus and Galileo), Evolution, Social Studies (e.g., birth control, divorce, abortion) or, to quote again from Justice JACKSON in *McCollum* (*supra*, p. 236), "even the New England effort to found 'a Church without a Bishop and a State without a King' * * *". The New Englanders succeeded, for a while, in creating one of the most absolute theocracies of all time. No doubt Jefferson and Madison had this in mind when they fashioned the First Amendment, as well as the grounds for rebellion of "Recusants" and "Dissenters" against the Church of England. "It is too much to expect that mortals will teach subjects about which their contemporaries have passionate controversies with the detachment they may summon to teaching about remote subjects such as Confucius or Mohammed. When instruction turns to proselyting and imparting knowledge becomes evangelism is, except in the crudest cases, a subtle inquiry." (*McCollum* v. *Board of Educ.*, 333 U. S. 203, 236, JACKSON, J., concurring.)

This has the most direct bearing upon the point presently at issue. If it were not true, church members who are com-

pelled by law to pay taxes for public schools would not feel constrained by conscience and discipline to support religious schools for their own children. If the state is to provide schoolbooks for instruction in "secular" fields, which have inseparable religious connotations, and parochial schools become increasingly dependent upon state money to provide textbooks, which are the lifeblood of education, this statute will create and foster a pressure to dominate the choosing of books that shall be used in the public schools (so that they may be used also in parochial schools) which will always be latent, and at certain times and places, irresistible, and, as action begets reaction, there will be an opposite tendency, equally dangerous, on the part of the state to dominate the church.

As in the case of a trustee (e.g., *Matter of Hubbell,* 302 N. Y. 246, 259), the motivation of a religious group may be of the best, and its sense of mission the most disinterested, and yet—unless we are to change our governmental philosophy—the fundamental law will not permit it to be placed in a position where its own interest depends upon eroding the principle of separation between church and state.

The tendency on the part of the state to dominate the church has been observed in every totalitarian country, and it is actually what the First Amendment and article XI (§ 3) of the State Constitution were designed to prevent. The writings of James Madison, in particular, indicate that his concern for the separation between church and state was that he believed it to be as much in the interest of religion as of government.

If there were some applicable standard by which secular and religious textbooks could be distinguished from each other, there would remain the question whether taxpayers'

money could be spent to buy necessaries for parochial schools, thus liberating funds to be spent upon more strictly religious objectives. We are not required now to determine the constitutionality of expenditures for school lunch programs, health and welfare services, busing, or even scholarships in the case of higher education. Our present concern is solely with textbooks for children, which are at the heart of the educational process.

The order appealed from should be reversed and the order and judgment of the Supreme Court, Albany County, be reinstated.

Judges BURKE, BERGAN and KEATING concur with Judge SCILEPPI; Judge VAN VOORHIS dissents and votes to reverse in a separate opinion in which Chief Judge FULD and Judge BREITEL concur.

Order affirmed.

Judgment on Remittitur

SUPREME COURT
STATE OF NEW YORK

ALBANY COUNTY

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT No. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACK, SAND LAKE and NORTH GREENBUSH, RENSSELAER COUNTY and CHATHAM, COLUMBIA COUNTY and BOARD OF EDUCATION OF UNION FREE DISTRICT No. 3, TOWNS OF NORTH HEMPSTEAD and OYSTER BAY, NASSAU COUNTY, NEW YORK,

Plaintiffs-Appellants,

—against—

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York,

Defendant-Respondent,

—and—

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH and BARBARA BRENNAN,

Intervenor-Defendants-Respondents.

The above named appellants, the Boards of Education of the East Greenbush and Roslyn School Districts, having appealed to the Court of Appeals from an order of the Appellate Division of the Supreme Court, Third Judicial Department, entered in the office of the Clerk of that Court on the 6th day of January, 1967, reversing an order and judgment of Supreme Court, Albany County, entered in the office of the Albany County Clerk on the 30th day of August, 1966, holding Chapter 320 of the Laws of 1966, to be unconstitutional and void insofar as it provides for the

purchase and loan of textbooks to pupils attending religious schools, said order of reversal having held that the plantiffs had no standing to contest the constitutionality of an act of the State Legislature, and said appeal having been argued at a term of the Court of Appeals of the State of New York, commencing on February 14, 1967, by Marvin E. Pollock, Esq., of counsel for plaintiffs-appellants, and by Mrs. Jean M. Coon, of counsel for Louis J. Lefkowitz, Attorney General of the State of New York, attorney for defendant-respondent, and by Porter Chandler, Esq., of counsel for James J. MacKrell, Esq., attorney for intervenor-defendants-respondents, and briefs of amici curiae having been submitted, and after due deliberation, the said Court of Appeals, having handed down its decision, on June 1, 1967, affirming the order of the Appellate Division, three judges dissenting, holding Chapter 320 of the Laws of 1966 constitutional in all respects, without costs,

And the original record and remittitur of the Court of Appeals having been filed in the Albany County Clerk's office, it is

ORDERED AND ADJUDGED that the order and judgment of Supreme Court, Albany County, entered August 30, 1966, be and the same hereby is reversed.

JOHN S. BARTLETT, JR.
Albany County Clerk

Dated: Albany, New York
June 15, 1967

SUPREME COURT U.S.

OCT 27 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 660

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACK, SAND LAKE and NORTH GREENBUSH, RENSSELAER COUNTY and CHATHAM, COLUMBIA COUNTY and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3, TOWNS OF NORTH HEMPSTEAD and OYSTER BAY, NASSAU COUNTY, NEW YORK,

Appellants,

—v.—

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York,

Appellee,

—and—

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH, and BARBARA BRENNAN,

Intervenor-Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

PORTER R. CHANDLER
Attorney for Intervenor-Appellees
1 Chase Manhattan Plaza
New York, N. Y. 10005

RICHARD E. NOLAN
JAMES J. MACKRELL
JEROME M. CONGRESS
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 660

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACH, SAND LAKE and NORTH GREENBUSH, RENSSELAER COUNTY and CHATHAM, COLUMBIA COUNTY and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3, TOWNS OF NORTH HEMPSTEAD and OYSTER BAY, NASSAU COUNTY, NEW YORK,

Appellants,

—v.—

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York,

Appellee,

—and—

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH, and BARBARA BRENNAN,

Intervenor-Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, intervenor-appellees move to dismiss this appeal, or in the alternative to affirm the judgment below, on the ground that it presents no substantial federal question warranting plenary review by this Court.

Question Presented

The New York Legislature has enacted a statute providing for the free loan of secular textbooks approved by the public school authorities to all children who attend any school—public or private—which complies with the compulsory education law.

The sole question here presented is whether the First and Fourteenth Amendments require that the benefits of that statute be denied to those children—and only those children—who attend religiously-affiliated schools.

Statement of the Case

Chapter 320 of the New York Laws of 1965 and Chapter 795 of the Laws of 1966 (effective September 1, 1966) amend Section 701 of the New York Education Law to provide, *inter alia*, that the boards of education throughout the state shall purchase textbooks "designated for use in any public, elementary or secondary schools of the state or . . . approved by any boards of education, trustees or other school authorities" and loan them "upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law. . . . " (See Appendix A for full text of statute). The textbooks are not loaned to any school. They are made available directly to the pupils.

The amended Section 701 embodies the New York Legislature's recognition that availability to all children of high quality education in secular subjects is a matter of pressing public concern. The preamble declaring the Legislature's purposes in enacting the amendment to Section 701 states:

"Section 1. Statement of policy. The security and welfare of the nation require the fullest development of the mental resources and skills of its youth. This calls for more adequate educational opportunities and increased efforts to educate more of the talent of our nation and requiring the correction of those imbalances in our educational programs which have led to an insufficient proportion of our population educated in the fields of science, mathematics, foreign languages and other non-sectarian subjects. The Congress of the United States has reaffirmed the principle that the states and local communities retain primary responsibility for public education. It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state." N. Y. Sess. Laws 1965, Ch. 320, § 1.

In this action plaintiffs sought a declaratory judgment that amended Section 701 of the Education Law, insofar as it provides for the loan of secular textbooks to pupils attending non-public schools operated under religious auspices, is contrary to the New York State Constitution and to the Establishment Clause of the First Amendment. Plaintiffs claim that the statute is unconstitutional *only* "in so far as it provides for the purchase of textbooks with public moneys for free loan to pupils attending religious schools" (Complaint, 33).* (See also the prayer for relief (34); the order and judgment of the trial court sustaining appellants' claim (77-78); "Questions Presented" in appel-

* Numbers in parentheses refer to the Transcript of Record.

lants' Statement as to Jurisdiction (p. 4)). They nowhere claim that the statute is unconstitutional in so far as it provides for the loan of books to pupils attending either (i) public schools or (ii) non-religiously-affiliated private schools.

The intervenor-defendants are the parents of children residing in the East Greenbush School District and attending Catholic parochial schools in the District pursuant to the compulsory education law. In the past, all of those parents (and others similarly situated) have purchased at their own expense the textbooks which their children have been using. (47) Under the new Section 701, those children will be entitled to the loan of secular textbooks as provided in that Section.

Defendant Commissioner and the intervenor-defendants both answered that the Section is constitutional. (37, 55) Defendant Commissioner also challenged plaintiff's capacity to sue under New York law. (39)

Intervenor-defendants further alleged that to forbid the loan of secular textbooks to children in lawful attendance under the compulsory education laws at private schools conducted under religious auspices, while permitting the loan of such textbooks to children attending other private schools not under religious auspices, would be an interference with free exercise of religion, a denial of the equal protection of the laws, and a denial of liberty and property without due process of law, contrary to the First, Fifth, and Fourteenth Amendments to the Constitution of the United States. (57-59)

All parties moved for summary judgment. (40-43; 59-60) The trial court ruled that plaintiffs had standing to

sue, and ruled in favor of plaintiffs on the merits. (63-72; 51 Misc. 2d 297, 273 N.Y.S.2d 239 (1966)) The Appellate Division, Third Department, held that plaintiffs lacked standing to sue. (88-90; 27 A.D.2d 69, 276 N.Y.S.2d 234 (1966)) Although three of the justices in the Appellate Division found it unnecessary to rest their decision on the merits because of their determination that the plaintiffs lacked standing to sue, all five Appellate Division justices were unequivocal in their opinion that the statute contravened neither the New York nor the United States Constitution. (89, 96-104; 27 A.D.2d at 71, 75-80, 276 N.Y.S.2d at 237, 241-46)

The Court of Appeals reached the merits,* holding that the statute was a constitutional exercise of the New York Legislature's authority to provide for the secular education of all children within the state, and did not contravene either Article XI, Section 3 of the New York Constitution or the First Amendment to the Federal Constitution. (13-28; 20 N.Y.2d 109, 228 N.E.2d 791 (1967)). The court dealt first with constitutionality under Article XI, § 3 of the New York Constitution, which prohibits use of state money, property, or credit "directly or indirectly, in aid or maintenance" of any church-related school. The court held that, since Section 701 was designed not to aid religion either directly or indirectly but to benefit all school children by improving their secular education, "any benefit accruing to . . . [religiously-affiliated] schools is a collateral effect of the statute, and, therefore, cannot be properly classified as the giving of aid directly or indirectly." (20; 20 N.Y.2d at

* Three members of the majority in the Court of Appeals thought plaintiffs lacked standing, but one member of the majority agreed with the dissent that plaintiffs did have standing.

116, 228 N.E.2d at 794) The Court noted the similarity of the textbook loan program to the activities of public libraries, which routinely loan books to parochial school students for use as aids in their course work, without any suggestion that the state is thereby providing unconstitutional aid to religiously-affiliated schools.

The Court observed that:

> "No one in the last third of the 20th Century can doubt that a program aimed at improving the quality of education in all schools is a matter of legitimate state concern. . . .
>
> At a time when we have large-scale Federal and State aid to education, it is justly feared that children who are denied these benefits may receive education inferior to children in public schools. Unless certain types of aid can be made available to *all* children, we run the risk of creating an educational lag between children in public and private schools." (20-21; 20 N.Y.2d at 116-17, 228 N.E.2d at 794)

For the same reasons the Court held that there was no violation of the First Amendment:

> "The State makes no affirmation of religious beliefs or activities within the public schools. Section 701 remains completely neutral with respect to religion, merely making available secular textbooks at the request of the individual student and asking no question about what school he attends. Despite the flexibility of the English language, it is impossible to conclude that loaning nonreligious textbooks to all students, including those who attend a parochial school, establishes a religion or constitutes the use of public funds to aid

religious schools. (*Cf. Everson* v. *Board of Educ.*, 330 U.S. 1, 16, 18)

"As a practical matter, to deny private school children the benefit of the State aid provided by section 701 could widen the gap between those children in deprived areas who attend parochial schools and those attending public schools in the same areas who receive the benefits of all the many and necessary programs backed by the massive resources of both State and Federal Governments." (21-22; 20 N.Y.2d at 117-18, 228 N.E.2d at 794-95)

The dissenting judges, while declaring that amended Section 701 infringed the New York Constitution, gave no definitive opinion with respect to the status of Section 701 under the Federal Constitution, but merely expressed uncertainty in that regard. (24-28; 20 N.Y.2d at 120-24, 228 N.E.2d at 796-99).

The Lack of a Substantial Federal Question

A. *As to the Establishment Clause.*

This appeal presents no substantial federal question, but is rather an effort by appellants to overturn constitutional doctrines enunciated in *Everson* v. *Board of Education*, 330 U.S. 1 (1947) and subsequently confirmed in such cases as *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 222 (1963); and *Sherbert* v. *Verner*, 374 U.S. 398, 410 (1963).

The majority of the Court of Appeals properly grounded its decision with respect to the Federal Constitution on *Everson* v. *Board of Education*, 330 U.S. 1 (1947), in which

this Court held that a New Jersey statute reimbursing parents of children attending Catholic schools for bus transportation did not violate the Establishment Clause of the First Amendment. Given the legislature's secular purpose to aid all children regardless of the schools attended, incidental benefits to nonsecular schools did not offend the Constitution. The First Amendment's requirement that the state be "neutral" in its relations with groups of varying religious beliefs does not prohibit a state "from extending its general state law benefits to all its citizens without regard to their religious belief". (330 U.S. at 16):

> "... It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State. ...
>
> Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. *That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.*" (330 U.S. at 17-18) (emphasis added)

Indeed, this Court pointed out that, under the Free Exercise Clause,

> "...New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation." (330 U.S. at 16) (emphasis in opinion)

Just as the State may under *Everson* reimburse parents of non-public school pupils for the cost of school bus transportation, there is no barrier to a State's loaning secular textbooks to non-public school children whose parents would otherwise be required to pay for those books. In each case the State program serves a valid secular public purpose, and in neither case does one penny go to the school. The only real difference between the situation before and after enactment of Section 701 is that, while the parents previously paid for their children's books, the State now does so. Any benefit to the schools attended by the children is incidental.

In *Everson* the safety of school children was considered a valid public purpose despite incidental benefits to parochial schools; in like manner the amended Section 701 reflects the valid purpose of improving the secular education of all children. This is shown by the preamble expressing the purpose of the statute (see above, p. 3) and by the number of statutes, both federal and state, providing for educational benefits to all students including those attending church-related institutions.* A substantial propor-

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* *E.g.*, Elementary and Secondary Education Act of 1965, 79 Stat. 27, 20 U.S.C. §§ 236-44 (Supp. II, 1966) (textbooks, library materials, shared programs); National Defense Education Act of

tion of all students receive their education in religiously-affiliated schools. The adequacy of their secular education would be significantly impaired if secular educational aid were provided, as plaintiffs insist, to all students *except* those in religiously-affiliated schools. (See majority opinion in Court of Appeals, 21-22; 20 N.Y.2d at 117-18, 228 N.E.2d at 794).

Appellants' effort to find a basis in recent precedents for their claim that *Everson* should be overruled is unconvincing. This Court has just dismissed, for lack of a substantial Federal question, an appeal challenging on First Amendment grounds a Pennsylvania bus transportation law similar to that in *Everson* and suggesting that *Everson* be overruled. *Rhodes* v. *School Dist. of Abington Township,* (No. 225) decided October 9, 1967. At the same time this Court denied a petition for certiorari challenging the same statute and expressly seeking the overruling of *Everson. Worrell* v. *Matters,* (No. 110) decided October 9, 1967. In addition, appellants ignore the decision of this Court in *Snyder* v. *Town of Newtown,* 365 U.S. 299 (1961) (*per curiam*) that an attack on bus transportation to church-related schools failed to present a substantial federal question.

Appellants purport to find some support for their position in *McCollum* v. *Board of Education,* 333 U.S. 203

1958, 72 Stat. 1581, 20 U.S.C. 401-592 (1964) (tuition payments); G.I. Bill of Rights (Veterans Readjustment Assistance Act of 1952), 38 U.S.C. §§ 1601-69 (1964) (tuition payments); G.I. Bill of Rights, 58 Stat. 289 (1944) (textbook payments); National School Lunch Act, 60 Stat. 230 (1946), 42 U.S.C. §§ 1751-60 (1964); New York State Scholar Incentive Program and Regents Scholarship Program, N.Y. Education Law §§ 600, 601-a (McKinney Supp. 1967).

(1948) (despite appellants' admission that the reasoning of the *Everson* dissenters failed to win majority acceptance in that case (Statement as to Jurisdiction, p. 14), in *Engel* v. *Vitale,* 370 U.S. 421 (1962), and in *Abington School Dist.* v. *Schempp,* 374 U.S. 203 (1963) (Statement as to Jurisdiction, pp. 14-15). None of these cases is in point. In each the Court held a state law invalid on the ground that establishment of religion results from performance of religious exercises inside the public schools. Unlike the state-sponsored activities held unconstitutional in these cases, the amended Section 701

> "makes no affirmation of religious beliefs or activities within the public schools. Section 701 remains completely neutral with respect to religion, merely making available secular textbooks at the request of the individual student and asking no question about what school he attends". (majority opinion in Court of Appeals, 21; 20 N.Y.2d at 117, 228 N.E.2d at 794).

In addition to *per curiam* dismissals of attempts to relitigate *Everson,* recent cases in this Court dealing with the merits have reaffirmed the principles declared in *Everson* and indicate their applicability to Section 701. In *McGowan* v. *Maryland,* 366 U.S. 420 (1961), this Court held that a state Sunday closing law originally having a religious purpose was not repugnant to the "establishment of religion" clause since its purpose had by the time of suit become secular—the encouragement of a day of leisure for the community—and since the law itself was reasonably calculated to achieve its ends. Speaking for the Court, Chief Justice Warren declared:

> ". . . the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulations." (366 U.S. at 442)

The views expressed in *McGowan* are also applicable to state acts, such as Section 701 of the New York Education Law, extending public benefits to *all* children.

In two of the cases invoked by appellants in their argument that *Everson* should be overruled, this Court actually cited *Everson* as a leading precedent in determining the propriety of state actions or programs having an impact in areas of religious affiliation. *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 222 (1963); *Sherbert* v. *Verner,* 374 U.S. 398, 410 (1963). Moreover, the principles declared in these cases demonstrate the constitutionality of the amended Section 701. In *Schempp,* this Court said:

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." (374 U.S. at 223)

In the case at bar there is present a plain and clear "secular legislative purpose"—namely, the improvement of education generally by making secular textbooks available to all requesting students, regardless of the schools they attend.

There is also present "a primary effect that neither advances nor inhibits religion". This is perhaps best demonstrated by assuming that the statute were rewritten as appellants insist. So rewritten, the statute would provide that secular textbooks must be loaned to pupils attending (a) public schools and (b) non-public schools in which no religious instruction is given, but that such textbooks must *not* be loaned to pupils attending any school in which religion is taught. The religious affiliation of the child (or of the school which he attends), would thus become the direct and sole test as to whether secular benefits should be granted or denied.

This would condition receipt of public benefits upon attendance at public schools or at private schools which were not religiously affiliated, in violation of the right of parochial school children and parents to the free exercise of their religion. In *Sherbert* v. *Verner*, 374 U.S. 398 (1963), this Court held that South Carolina had infringed appellant's right to the free exercise of religion by denying her application for unemployment compensation after her discharge for refusal to work on Saturday, the Sabbath day of her faith. Noting that it was

> "too late in the day to doubt that the liberties of religion * * * may be infringed by the denial of or placing of conditions upon a benefit or privilege", (374 U.S. at 404)

this Court declared that its holding

> "* * * but reaffirms a principle that we announced a decade and a half ago, namely that no State may 'exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation.' *Everson* v. *Board of Education,* 330 U.S. 1, 16." (374 U.S. at 410) (emphasis in opinion)

As Mr. Justice Douglas stated in his concurring opinion in *Thorpe* v. *Housing Authority,* 386 U.S. 670, 678-79 (1967):

> "The recipient of a government benefit, be it a tax exemption (*Speiser* v. *Randall,* 357 U.S. 513), unemployment compensation (*Sherbert* v. *Verner,* 374 U.S. 398), public employment (*Slochower* v. *Board of Education,* 350 U.S. 551), a license to practice law (*Spevack* v. *Klein,* 385 U.S. 511), or a home in a public housing project, cannot be made to forfeit the benefit because he exercises a constitutional right."

Any burden imposed by a state without good cause on attendance at church-related schools is a burden on the parents' constitutional right to send their children to such schools. *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534-35 (1925), cited with approval in *Griswold* v. *Connecticut,* 381 U.S. 479, 482 (1965).

Despite appellants' effort to distinguish *Cochran* v. *Louisiana State Board of Education,* 281 U.S. 370 (1930) (Statement as to Jurisdiction, p. 12), *Cochran* is clearly

in point and strongly supports the result below. In *Cochran* this Court unanimously upheld the constitutionality of a Louisiana statute under which free secular textbooks were to be made available to all public and private school students. Since the Court had not yet held the Establishment Clause binding on the states under the Fourteenth Amendment, the statute was attacked as an unconstitutional application of public funds for a private purpose. The question whether the law constituted an "establishment of religion" was, however, implicit in the case, since the *Cochran* plaintiff's argument was that the private purpose being served was aid to church-related schools. This Court unanimously rejected that contention, holding that the Louisiana statute represented secular aid to children at all schools rather than the use of public money to aid church-related schools.

The continuing vitality of *Cochran* is shown by this Court's reference to *Cochran* to support its holding in *Everson* that the New Jersey bus transportation statute was not a use of public funds for a private purpose. Citing *Cochran,* this Court stated:

> "It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose." (330 U.S. at 7)

Appellants have thus presented no basis for their claim that the principles embodied in *Everson* and *Cochran* ought to be overruled.* We submit that this case raises no sub-

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* The cases cited by appellants (Statement as to Jurisdiction p. 10) to show that in three states provision of textbooks to parochial school students has been held to violate the state constitutions are inapposite. In *Dickman* v. *School Dist. No. 62C,* 232 Ore. 238, 260-61, 366 P.2d 533, 545 (1961), the court stressed

stantial question under the Establishment Clause, and that the appeal should be dismissed.

B. *As to the Free Exercise Clause.*

Nor does this appeal raise any substantial federal question under the Free Exercise Clause. Appellants say that "there is no reliable method by which secular and religious textbooks can be distinguished from each other" and that in consequence a danger exists that church groups will seek to influence the selection of books in the public schools. (Statement as to Jurisdiction, pp. 16, 17) This is pure speculation as to future events, with nothing in the record to suggest that such events are likely to happen and nothing to suggest that the New York courts and the New York State Department of Education would not be quick to correct any administrative abuses if such should ever occur. There is no question that the intent of the New York Legislature was to limit texts loaned under the statute to secular material, and the statute has now been so construed by the New York Court of Appeals.* (21; 20 N.Y. 2d at 117, 228 N.E.2d 794-95) Certainly the determination of the New York Legislature that the amended Section 701 is a workable means of providing good secular education

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that its decision was made without regard to federal law. In *Zellers* v. *Huff*, 55 N.M. 501, 236 P.2d 949 (1951), the trial and appellate courts treated provision of textbooks (including sectarian texts) as merely one aspect of a situation in which non-secular schools were being used as complete substitutes for public schools in certain parts of New Mexico, a situation not present here. Finally, the court in *Haas* v. *Independent School Dist. No. 1*, 69 S.D. 303, 310, 9 N.W.2d 707, 710 (1943) firmly refused to consider the constitutional question, having held that the statute clearly did not authorize the grant of textbooks to students at religiously-affiliated schools.

* This opinion is in accord with prior administrative interpretation. See Opinion of Counsel No. 181, ¶6 (July 8, 1966), issued by the Education Department of the State of New York.

to students at all schools should not be rejected on the basis of mere hypothesis.

If this branch of appellants' argument were valid, the basic assumptions underlying the entire public school system would be open to serious question. If no adequate identification of secular versus nonsecular material can be made and if this alleged fact will produce a struggle among religious groups for use of materials reflecting their various points of view, then, by the reasoning of appellants, the danger already exists, wholly apart from the present statute. Children in the public schools come from all faiths. On appellants' theory, there is nothing to prevent their parents—regardless of the present statute—from engaging in a power struggle over the choice of textbooks for public-school use only, with the result that the public schools will inevitably be subverted to the service of religion (or non-religion) wherever one group happens to predominate. We submit that such reasoning is compelled by appellants' analysis, and we further submit that it has no basis in experience and clearly no basis in the record.

A second branch of appellants' argument with respect to free exercise is that parents and parochial schools will become so dependent on state textbook aid that they "may well find themselves having to accept textbooks which are offensive to them . . . ." (Statement as to Jurisdiction, pp. 17-18) For at least two different reasons this argument fails to demonstrate a violation of the Free Exercise Clause.

First, the impact of Section 701 on education at church-related schools is far too speculative to support a holding that the free exercise of religion will be impaired. To the extent that parents fear that the unique nature of parochial

education may be weakened by use of secular texts, they are free either to reject such books or to supplement them with nonsecular material.

Second, coercive activity by the state, a prerequisite to violation of the Free Exercise Clause (see *Engel* v. *Vitale*, 370 U.S. 421, 430 (1962)) is no part of Section 701, which merely makes textbooks available upon request and involves no governmental compulsion whatsoever. Requests for books from pupils at church-related schools will of course reflect the need of students at these schools for participation in state and federal aid-to-education programs if they are not to suffer an inadequate education. However, this need is not the result of any program of the state government calculated to impair parochial education, and thus acceptance of textbooks under Section 701 would not be the result of that coercion by government which is necessary to violate the Free Exercise Clause.

The cases cited by appellants in support of their argument on the Free Exercise Clause in no way substantiate their position. These citations consist of a quotation from the majority opinion in *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 222 (1963) (Statement as to Jurisdiction, pp. 17-18) which merely states that the Free Exercise Clause prohibits invasions of religious liberty by the civil authority, and citations to four cases in which this Court held that state-imposed inhibitions upon the practice of religion offended the Free Exercise Clause. *Sherbert* v. *Verner*, 374 U.S. 398 (1963) (denial of unemployment benefits to person whose religion prohibited Saturday work); *Torcaso* v. *Watkins*, 367 U.S. 488 (1961) (religious test for public office); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943) (licensing statute inhibiting religious solicitation); *Cant-*

well v. *Connecticut*, 310 U.S. 296 (1940) (licensing statute inhibiting religious solicitation).

In short, these cases show only that burdens on religious activity have been held to violate the Free Exercise Clause, but do not in any way suggest that the statute in the case at bar might offend that clause. Rather, as we show above, *Sherbert* v. *Verner* and *Everson* v. *Board of Education* clearly indicate that *denial* of secular textbooks to certain students merely because they attend church-related schools, while loaning such textbooks to students at all other schools whether public or private—the position for which appellants contend—would constitute a direct violation of the Free Exercise Clause.

CONCLUSION

It is respectfully submitted that this Court should dismiss this appeal or affirm the judgment below for lack of a substantial federal question.

Dated October 24, 1967

Respectfully submitted,

PORTER R. GHANDLER
Attorney for Intervenor-Appellees

RICHARD E. NOLAN
JAMES J. MACKRELL
JEROME M. CONGRESS
Of Counsel

APPENDIX A

Section 701, New York Education Law, as amended by Chapter 320 of the Laws of 1965 and Chapter 796 of the Laws of 1966 (effective September 1, 1966):

§ 701. Power to designate text-books; purchase and loan of text-books; purchase of supplies

1. In the several cities and school districts of the state, boards of education, trustees or such body or officer as perform the functions of such boards, shall designate text-books to be used in the schools under their charge.

2. A text-book, for the purposes of this section shall mean a book which a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends.

3. In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities. Such text-books are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities.

4. No school district shall, during the school year nineteen hundred sixty-six–sixty-seven, the school year nineteen hundred sixty-seven–sixty-eight or the school year nineteen hundred sixty-eight–sixty-nine be required to purchase or otherwise acquire textbooks, pursuant to this section, the cost of which shall exceed an amount equal to fifteen dollars multiplied by the number of children residing in such district who on the first day of October, of such school year are enrolled in grades seven through twelve of a public or private school which complies with the compulsory education law, or in any subsequent school year be required to purchase or otherwise acquire textbooks, the cost of which shall exceed an amount equal to ten dollars multiplied by the number of children residing in such district and so enrolled on the first day of October of such subsequent school year; and no school district shall be required to loan textbooks in excess of the textbooks owned or acquired by such district; provided, however that all textbooks owned or acquired by such district shall be loaned to children residing in the district and so enrolled in grades seven through twelve in public and private schools on an equitable basis.

5. In the several cities and school districts of the state, boards of education, trustees or other school authorities may purchase supplies and either rent, sell or loan the same to the pupils attending the public schools in such cities and school districts upon such terms and under such rules and regulations as may be prescribed by such boards of education, trustees or other school authorities.

6. The commissioner of education, in addition to the annual apportionment of public monies pursuant to article

seventy-three of this chapter, shall apportion to each school district an amount equal to the cost of the text-books purchased and loaned by the district pursuant to this section, but in no case shall the aid apportioned to the district be in excess of the following amounts: a. on account of expenditures made during the school year nineteen hundred sixty-six–sixty-seven the school year nineteen hundred sixty-seven–sixty-eight or the school year nineteen hundred sixty-eight–sixty-nine an average of fifteen dollars per pupil residing in the district and enrolled in grades seven through twelve, and

b. on account of expenditures made in any subsequent school year an average of ten dollars per pupil residing in the district and enrolled in grades seven through twelve.

7. The apportionment provided for in this section shall be paid, at such times as may be determined by the commissioner and approved by the director of the budget, during the school year in which the expenditures are made to the extent that such expenditures have been made and reported to the department prior to such apportionment. Expenditures by a school district in excess of the average of fifteen dollars per pupil in the school year nineteen hundred sixty-six–sixty-seven, the school year nineteen hundred sixty-seven–sixty-eight or the school year nineteen hundred sixty-eight–sixty-nine or in excess of ten dollars per pupil in any subsequent school year shall be deemed approved operating expense of the district for the purpose of computation of state aid pursuant to subdivision five of section thirty-six hundred two of the chapter, but expenditures up to such average of fifteen dollars or ten dollars above mentioned shall not be deemed approved operating expenses for such purpose.

JOHN F. DAVIS, CLERK

Supreme Court of the United States

No. 660 October Term, 1967

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1; TOWNS OF EAST GREENBUSH, NASSAU, SCHODACK, SAND LAKE and NORTH GREENBUSH, RENSSELAER COUNTY and CHATHAM, COLUMBIA COUNTY and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3, TOWNS OF NORTH HEMPSTEAD and OYSTER BAY, NASSAU COUNTY, NEW YORK,

Appellants,

against

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York,

Appellee,

and

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH and BARBARA BRENNAN,

Intervenor-Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION OF JAMES E. ALLEN, JR., TO DISMISS FOR WANT OF JURISDICTION

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Appellee
The Capitol
Albany, New York 12224

RUTH KESSLER TOCH
Solicitor General

JEAN M. COON
Assistant Attorney General

of Counsel

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION OF JAMES E. ALLEN, JR., TO DISMISS FOR WANT OF JURISDICTION

James E. Allen, Jr., as Commissioner of Education of the State of New York, appellee in the above-entitled matter, moves to dismiss the appeal herein on the ground that the Court lacks jurisdiction to hear the appeal for the reason that the appeal presents no substantial federal question.

Statement

Prior to 1965, New York Education Law, § 701 (*McKinney's Consolidated Laws*, Book 16, Part 1, § 701), authorized school authorities to purchase textbooks and either

sell or rent them to pupils attending public schools. This section was amended by Chapter 320 of the New York Laws of 1965, to provide, effective September 1, 1966, that local school boards must purchase and loan textbooks free of charge to children residing in the school district who are enrolled in grades 7 through 12 in a public or private school which complies with the State compulsory education law. Textbooks loaned to pupils in private schools are to be textbooks designated for use in any public school in the State or approved by a board of education.

As originally enacted, § 701 provided no limit upon the money required to be spent by the school districts but provided for State reimbursement up to $10 per pupil. This section was amended by New York Laws of 1966, Chapter 795, to provide that school districts are required to spend only up to a maximum of $15 per pupil for the first three years and $10 per pupil thereafter, which expenditures are to be totally reimbursed by the State to the *public* school districts. Expenditures in excess of $15 per pupil are to be included as operating expenses in the computation of State aid pursuant to New York Education Law, § 3602(5), which does not provide for 100% reimbursement.

By summons and complaint served April 29, 1966, this action was commenced seeking a declaratory judgment holding Chapter 320 of the Laws of 1965, insofar as it provides for the purchase and loan of textbooks to pupils attending sectarian schools, to be unconstitutional and in violation of Article XI, § 3 of the New York State Constitution and the First Amendment of the United States Constitution. The complaint further sought an order enjoining the Commissioner of Education from apportioning any public moneys to school districts for the purpose of purchasing textbooks for loan to pupils attending religious schools or

from removing any member of the plaintiff board of education who refused to comply with these provisions of law.

Defendant Commissioner's answer, in addition to denying the allegations of unconstitutionality of the statute, set up certain affirmative defenses which are not in issue here. By order to show cause, six parents of children, resident in the plaintiff East Greenbush district and attending sectarian schools, sought leave to intervene in the action as parties defendant. This motion to intervene was granted and all parties then moved for summary judgment. At the time of the oral argument of the cross-motions for summary judgment, plaintiff Union Free School District (Roslyn District) sought leave to join in the action as a party plaintiff, which motion was also granted.

New York Supreme Court, Albany County, held Education Law, § 701, to be unconstitutional under both Article XI, § 3, of the New York Constitution and the First Amendment of the United States Constitution, insofar as the statute provides for the loan of textbooks to pupils attending sectarian schools, and granted plaintiffs' motion for summary judgment (51 Misc. 2d 297, 273 N. Y. S. 2d 239). The statute was held unconstitutional under a provision of the New York State Constitution, based on two New York State Court decisions (*Smith* v. *Donahue*, 202 App. Div. 656, 195 N. Y. Supp. 715 [3rd Dept., 1922]; and *Judd* v. *Board of Education*, 278 N. Y. 200, 15 N. E. 2d 576 [1938]).

As to the invalidity of the statute under the First Amendment, the Court relied primarily upon *Engel* v. *Vitale*, 370 U. S. 421, and *School District of Abington TP., Pa.* v. *Schempp*, 374 U. S. 203.

The Appellate Division of the Supreme Court, Third Judicial Department, reversed the Trial Court's decision

(27 A. D. 2d 69, 276 N. Y. S. 2d 234). However, the majority opinion in that Court was based on a finding of lack of standing on the part of plaintiffs to raise the issue of constitutionality. The remaining Justices concurred in the result, but on the ground that, although they would have held that the districts had standing, they were of the opinion that the statute was in fact constitutional. Indeed, the majority itself stated in *dictum* that they were also of the opinion that the statute was constitutional and would have so held had they reached the merits.

Plaintiffs then appealed to the New York Court of Appeals. Four judges held that plaintiffs had standing to bring the action[1], four judges also held that the statute was constitutional[2], but only one judge was a part of both majorities[3] (20 N. Y. 2d 109; 281 N. Y. S. 2d 799, 228 N. E. 2d 791).

The Court of Appeals decision was based on a finding that the provision of secular textbooks to all children regardless of their religious affiliation did not constitute an aid to religion. In so holding, the Court's opinion states (20 N. Y. 2d, p. 116):

> "The purpose underlying section 701, found in the Legislature's own words (L. 1965, ch. 320, § 1, *supra*), belies any interpretation other than that the statute is meant to bestow a public benefit upon all school children, regardless of their school affiliations. There can be no serious suggestion that the declaration of purpose by the Legislature was a verbal smoke screen designed to obscure a nefarious scheme to circumvent the New York State Constitution. No one in the last third of the 20th Century can doubt that a program aimed at

[1] Chief Judge FULD and Judges VAN VOORHIS, KEATING and BREITEL.

[2] Judges BURKE, SCILEPPI, BERGAN and KEATING.

[3] Judge KEATING.

improving the quality of education in all schools is a matter of legitimate State concern.

"Since there is no intention to assist parochial schools as such, any benefit accruing to those schools is a collateral effect of the statute, and, therefore, cannot be properly classified as the giving of aid directly or indirectly."

Citing *Everson* v. *Board of Education* (330 U. S. 1), the Court of Appeals held that the loaning of secular textbooks to all students also does not violate the First Amendment in that such a practice neither establishes a religion nor constitutes the use of public funds to aid religious schools.

ARGUMENT

The appeal fails to raise a substantial federal constitutional question.

The appellants here contend that the provision of textbooks equally to all school children constitutes a prohibited aid to religion because some of those children attend sectarian schools. Appellee submits that this argument presents no substantial federal constitutional question because the legal issue has already been decided by this Court.

The decisions of this Court have never invalidated public benefit programs which have as an incidental or collateral effect resulted in some aid to a religious institution. In the *Everson* case, *supra*, the majority opinion clearly found non-discriminatory programs directed to a non-denominational public purpose to be valid, a holding found particularly in such declarations in the opinion as the following:

"While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the

citizens of New Jersey against state-established churches, to be sure that we do not indirectly prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief" (330 U. S., p. 16).

"That [First] Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them" (330 U. S., p. 18).

Even more recently this Court held valid the Sunday closing statutes of several states on the ground that they were directed to promote the appropriate secular objective of having a single day of rest during the week (*McGowan* v. *Maryland*, 366 U. S. 420 [1961]; *Two Guys From Harrison —Allentown, Inc.* v. *McGinley*, 366 U. S. 582 [1961]; *Gallagher* v. *Crown Kosher Super Market, Inc.*, 366 U. S. 619 [1961]; *Braunfeld* v. *Brown*, 366 U. S. 599 [1961]). Thus, if government directs its purposes to an appropriate secular end, as opposed to a governmental program designed to aid or promote religious activity as such, this Court has already held such a program to be valid and constitutional and no new constitutional issue is raised for consideration here solely because the factual issue involves textbooks, rather than school busing or a single day of rest.

The end to be achieved by the provision of textbooks was clearly equality of educational opportunity for all students. The legislative policy statement set forth in Chapter 320 demonstrates the significance of this welfare concept in the legislative enactment:

"The security and welfare of the nation require the fullest development of the mental resources and skills of its youth. This calls for more adequate educational opportunities and increased efforts to educate more of the talent of our nation and requiring the correction of

> those imbalances in our educational programs which have led to an insufficient proportion of our population educated in the fields of science, mathematics, foreign languages and other non-sectarian subjects. The Congress of the United States has reaffirmed the principle that the states and local communities retain primary responsibility for public education. It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense, and the general welfare of the state."

The national, as well as State, welfare interest in the education of all children, expressed in the policy statement of Chapter 320 finds an echo in the concern of President Johnson in his Education Program Message of January 12, 1965, wherein he noted:

> " 'The explosion of knowledge and the rapid revision of curriculums in the schools has created new demands for textbooks. The obsolete text can suffocate the learning process. Yet the cost of purchasing textbooks at increasing prices puts a major obstacle in the hands of education—an obstacle that can and must be eliminated' " (111 Cong. Rec. 499, 500).

The secular purpose in the provision of textbooks to all students is thus readily apparent. The aid to sectarian religion, alleged by appellants, cannot be so found.

It is an uncontested fact in this case that the pupils resident in the appellant districts, who attended sectarian schools before Chapter 320 was enacted, were required to purchase their own texts. The schools did not provide them. Under Chapter 320, textbooks are loaned to individual students, no matter what the auspices of the school in which they are enrolled. The textbooks loaned are those approved for use in public schools and the loan to the pupil, who would otherwise have to purchase his own books, can

in no way be said to be an aid to denominational schools, either directly or indirectly.

That the provision of textbooks to all pupils equally is not an aid to their schools has also already been determined by this Court (*Cochran* v. *Board of Education*, 281 U. S. 370 [1930]), although as a question under the Fourteenth Amendment rather than the First. At the time of that decision, the provisions of the First Amendment had not yet been extended to cover State action; consequently, the issue in the *Cochran* case was whether the provision of textbooks to pupils who attended sectarian schools was a taking of private property for a private purpose in violation of the due process clause of the Fourteenth Amendment. This Court rejected the argument of appellants there in an opinion by Chief Justice HUGHES, quoting a portion of the opinion of the Louisiana Supreme Court (281 U. S. at pp. 374-375):

> " 'The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or non-sectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation because of them. The school children of the state alone are beneficiaries.' "

Here, too, the schools gain nothing, are relieved of no obligations, and all the children of the State are the only beneficiaries.

A further test of the constitutional validity of legislative enactments was put forth in the recent *Schempp* case (*School District of Abington TP., Pa.* v. *Schempp*, 374

U. S. 203 [1962]), in which Mr. Justice CLARK, writing for the Court, stated (p. 222):

> "The test may be stated as follows: What are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

In this case the purpose and primary effect of the legislation is to provide secular textbooks equally to all children regardless of their school affiliation. Religion is in no way aided, except in a possibly remote or collateral manner. Chapter 320, consequently, raises no issue under that test.

In view of the recent decisions of this Court, the issue presented by appellants on this appeal raises no substantial federal constitutional question warranting review by this Court.

CONCLUSION

The appeal herein should be dismissed for lack of jurisdiction to hear the appeal, on the ground that no substantial federal question is presented.

Dated: October 20, 1967.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Appellee
The Capitol
Albany, New York 12224

RUTH KESSLER TOCH
Solicitor General

JEAN M. COON
Assistant Attorney General

of Counsel

SUPREME COURT, U. S.

JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1967

No. 660

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APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLANTS

MARVIN E. POLLOCK
Attorney for Appellants
80 Pine Street
New York, New York 10005

Of Counsel:
ALAN H. LEVINE
c/o New York Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

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Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part II The Nonestablishment Principle,* 81 Harv. L. Rev. No. 3, 513 (Jan. 1968) 26

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N. Y. S. 2d 234 (A. 45). The opinion of the Supreme Court of the State of New York, Albany County, is reported at 51 Misc. 2d 297, 273 N. Y. S. 2d 239 (A. 29).

Jurisdiction

Notice of Appeal was filed on August 17, 1967 (R. 1) and the case was docketed on September 28, 1967. Probable jurisdiction was noted on January 15, 1968. The jurisdiction of this Court rests on 28 U. S. C. 1257 (2).

Constitutional and Statutory Provisions Involved

The Constitutional provisions involved are the religion clauses of the First Amendment.

The statute is Section 701, subdivision 3 of the New York Education Law, as amended L. 1965, C. 320, §2; L. 1966, C. 795, 16 McKinney's Consol. Laws of New York, §701.3, which provides:

> "In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities. Such text-books are to be

loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities."

Questions Presented for Review

1. Whether Section 701.3 of the New York Education Law violates the establishment clause of the First Amendment insofar as it requires textbooks to be purchased with public funds and furnished for use in sectarian schools.

2. Whether the same section violates the free exercise clause of the First Amendment insofar as it requires textbooks to be purchased with public funds and furnished for use in sectarian schools.

Statement of the Case

Appellants' complaint sought a declaratory judgment that Section 701.2* of the New York Education Law, to the extent it requires the purchase of textbooks with public moneys for free loan to pupils in sectarian schools, is unconstitutional and in violation of the New York State Constitution and the First Amendment to the United States Constitution (A. 6). The Supreme Court, Albany County, granted appellants' cross-motion for judgment (R. 42), denied motions for judgment made by the appellee and the intervenor-appellees (R. 40, 59), and declared the law to the extent challenged unconstitutional and in violation of the state constitution and both the establishment and free exercise clauses of the First Amendment (A. 40). The

* Subdivision (2) was renumbered subdivision (3) by New York Laws of 1966, c. 795.

Appellate Division, Third Department, declined to reach the merits of the case and reversed the order and judgment of the Albany County Supreme Court, and dismissed the complaint (A. 44) on the sole ground that appellants lacked standing to sue (A. 45). Two of the justices who concurred thought the appellants had standing and would have reversed on the merits (A. 47). By a vote of 4-3, the Court of Appeals affirmed the order of reversal of the Appellate Division (A. 62), holding that appellants did have standing to sue and also holding that the law did not violate either the New York State Constitution or the establishment clause of the First Amendment (A. 63).

The facts are not in dispute. Prior to 1965, Section 701 of the New York Education Law authorized school boards to purchase textbooks and either sell or rent them to pupils in public schools (A. 3). In 1965, by Chapter 320 of the Laws of 1965, Section 701 was amended to provide, effective September 1, 1966, that each school board must purchase and loan free to any child, who resides in the district and who is enrolled in grades seven through twelve of a public or *private* school which complies with the compulsory education law, *any* textbook requested by such child which is designated for use in *any* public school by *any* school board in the state (A. 4, 8). As originally enacted, new Section 701 did not contain any limit either as to the number of textbooks required to be purchased and loaned or the amount of public money required to be expended therefor by the local school districts. However, it did direct the Commissioner of Education, in addition to the annual apportionment of public moneys pursuant to the Education Law, to apportion to each school district an amount equal to the cost of the textbooks so purchased and loaned, but not more than $10 a pupil (A. 5).

After the institution of this action, by Chapter 795 of the Laws of 1966, the Legislature amended Section 701 again to effect two principal changes. One was to reduce the financial burden imposed on local school districts by the law (Subd. 4). The other was to define the word "textbook" as used in the statute to mean: "a book which a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends" (Subd. 2). A copy of Section 701 as so amended is set forth as an appendix to this brief.

Before taking office, each member of the appellant school boards took an oath of office, prescribed by Article XIII, Section 1 of the New York State Constitution, to support the Constitutions of the United States and the State of New York. Sections 306 and 1706 of the Education Law provide that any school board member who fails to comply with any section of the Education Law is subject to removal from office by the Commissioner of Education. Section 306 of the Education Law also provides that the Commissioner of Education may withhold public moneys from any school district whose school board fails to comply with any section of the Education Law (A. 5).

There are children residing in the appellants' school districts who are enrolled in grades seven through twelve of sectarian schools which comply with the compulsory education law (A. 12).

In the view of the appellant school boards, Section 701, as amended ("Textbook Law") was repugnant to both the New York State and United States Constitutions insofar as it applied to sectarian schools (A. 5). Faced with the choice of either violating their oaths of office or re-

fusing to implement the law thereby incurring the sanctions imposed for non-compliance, on April 29, 1966, the appellant East Greenbush school board commenced this action.

The answer, in substance, admitted the facts pleaded in the complaint as amended, but denied the unconstitutionality of the law (A. 10).

After issue was joined, five parents of children who resided in the school district of the appellant East Greenbush school board and who were enrolled in various grades from seven through twelve of accredited parochial schools were permitted to intervene in the action (A. 20). In their answer, the intervenors denied the allegations of the complaint relating to the unconstitutionality of the law and alleged three affirmative defenses (A. 22). The substance of these defenses was that to forbid the loan of textbooks to their children and other parochial school pupils while permitting the loan of such books to pupils attending private non-sectarian schools would be an interference with their free exercise of religion and a denial of equal protection and due process in violation of the First, Fifth and Fourteenth Amendments and the New York State Constitution (A. 24).

All parties then moved for judgment (R. 40, 42, 59). At the time of argument on the motions, the appellant Board of Education of Union Free School District No. 3 was joined as a party plaintiff (A. 27).

Summary of Argument

POINT I

Everson established that a state cannot contribute tax funds to the support of a religious institution. A sectarian school is a religious institution since its basic purpose is religion and the teaching of religion. There is no such thing as secular education in a sectarian school because the whole curriculum is permeated by religion. Textbooks, unlike transportation, are an integral part of the educational process which takes place in a sectarian school. They are used in connection with the teaching of religious tenets and faiths. By furnishing textbooks to sectarian schools, the state enables such schools to purchase religious texts with the money thus saved.

The student is only a nominal party in the selection and distribution of books under the Textbook Law. The parochial school instructs its students what books to obtain, it takes delivery of the books and it may store them indefinitely. The mere fact that textbooks also happen to benefit the students has no constitutional significance since all aid to parochial schools benefits their students. The so called "child benefit theory", which was rejected by implication in *Everson,* is merely a device to accomplish indirectly what cannot be done directly.

The Textbook Law did not establish a constitutionally valid public library system. The purpose of a public library is to purchase a wide variety of books, most of which are not "textbooks", and to make them available for a limited time to anyone in the library community. Public libraries make the book purchasing decisions and lend directly to

individual students without the intervention of the parochial school officials. They do not buy books at the order of religious authorities or permit exclusive utilization of books by persons of a particular religious background or institution.

The rule which emerges from the establishment clause tax cases is that if the particular public aid is earmarked for use by or within the confines of a religious institution in connection with functions associated with religion, then it is barred by the establishment clause.

The *Everson* interpretation of the scope of the establishment clause has not been narrowed by any subsequent decision. Where, as here, the issue is whether a particular law constitutes an impermissible aid to religion, once it is shown that it does, there are no saving considerations.

Recent state court decisions show a trend away from a few early decisions which sanctioned the practice of furnishing textbooks for use in parochial schools.

POINT II

The religious clauses of the First Amendment were designed to remove religion from the cognizance of the state. It was thought that religious liberty could flourish only if religion remained a matter of conscience, free from state support and other interferences. A state's use of its taxing powers to pay religious costs, educational or other, is no less an interference with religious freedom than forcing a man to attend church.

To the extent the Textbook Law requires books to be purchased with tax funds and furnished for use in a sec-

tarian school operated by members of one faith, it compels members of other faiths and nonbelievers to contribute to the propagation of opinions they disbelieve. It also creates the conditions under which the state may interfere with the freedom of sectarian schools, since control often follows aid as a matter of course. And, in its operation and through the built-in pressures to obtain control of the selection of the books, it brings about a union of church and state.

POINT I

To the extent the Textbook Law requires textbooks to be furnished for use in parochial schools, New York is using its taxing powers to support religious institutions in violation of the establishment clause of the First Amendment.

The issue in this case is whether a state may use its taxing powers to furnish textbooks for use in parochial schools. If a textbook is an integral part of the educational process, and if the operation of a sectarian school is intended by its sponsor to fulfill a basic religious function, then the furnishing of such book by the state constitutes a use of public funds for the support of a religious institution. The seminal case on the impact of the establishment clause on a state's power to tax is *Everson* v. *Board of Education,* 330 U. S. 1 (1947). It is, therefore, necessary to begin our present inquiry with an analysis of that case. In this connection, it is submitted that *Everson,* like any other landmark decision in a highly sensitive area, is important not only for what it said, but for what it did not say.

A. *Everson* established that a state cannot contribute tax funds to the support of religious institutions.

At issue in *Everson* were the provisions of a New Jersey statute permitting local school boards to provide transportation for students attending church schools. Justice Black, speaking for the majority, defined the scope of the establishment clause as follows:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' *Reynolds* v. *United States, supra* at 164." (330 U. S. at 15.)

While four justices split over the application of this definition to the facts of the case, it is important to observe that all of them agreed to the definition. What is more,

this definition has been repeated and reaffirmed three times since *Everson,* once by a unanimous court in *Torcaso* v. *Watkins,* 367 U. S. 488, 492-3 (1961).*

When he came to the application of the definition to the busing law, Justice Black first turned to the nature of the aid. Providing transportation, he said, was like state action in providing police and fire protection for schools. He then observed that the aid must not be outlawed if it was within the state's constitutional power even if it approached the verge of that power. A state, he said, could not contribute tax funds to the support of an institution which teaches the tenets and faith of any church. Presumably he was referring here to parochial schools. But neither could a state interfere with the free exercise by its citizens of their own religion, such as by excluding any believers or non-believers because of their faith or lack of it from receiving the benefits of public welfare legislation. With the issue thus posed, Justice Black reached this conclusion:

> "The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." (330 U. S. at 18.)

In his dissent, Justice Rutledge disagreed with the majority's conclusion that the busing law did not support the church schools. He contended that the primary reason

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* See also, *Illinois ex rel. McCollum* v. *Board of Education of School Dist. No. 71, Champaign County, Illinois, et al.,* 333 U. S. 203, 210, 211 (1948), and *McGowan* v. *Maryland,* 366 U. S. 420, 443 (1961).

children were sent to parochial school was to receive religious training and teaching. Payment of transportation costs not only helped the children to get to school and the parents to send them, but it aided them in their objective and was therefore aid to religion. Any aid to religion, he said, was intended by the framers of the First Amendment to be outlawed as constituting an establishment. To Justice Rutledge, the dual prohibition of the First Amendment made the religious function private and it could not be made a public one by legislative act. Thus, whether or not taxes were raised for a public purpose was, for him, a false issue clouding the real issue of the First Amendment's absolute bar.

It thus appears that what *Everson* did say was that the New Jersey busing law approached the verge of that state's constitutional power, that the providing of transportation resembled state action in providing functions (such as police and fire protection) which are in no sense connected with the religious functions of a parochial school, and that New Jersey contributed no money to the parochial schools and did not support them. It was this last finding that marked the point of divergence between the views of the majority and Justice Rutledge. It could also be said with some degree of assurance that the majority, like the dissenters, regarded parochial schools as religious institutions, for in posing the establishment clause issue the majority pointed out that a state cannot contribute tax funds "to the support of an institution which teaches the tenets and faith of any church."

Advocates of state aid to parochial schools have contended, however, that *Everson* also stands for the proposition that a state may use tax funds to pay for all items

of cost in connection with the obtaining of a parochial school education. They urge that *Everson* is to be read as saying that any tax measure is valid if the funds are appropriated for a public purpose, that the education of children is a public purpose, and therefore a tax to pay for parochial education is valid. The answer to this is, of course, that *Everson* dealt only with the cost of transportation, and did not deal with any educational costs. It is one thing to say the state may pay the cost of safely transporting a child to a school, including a parochial school. It is quite another thing to say that the state may pay the costs directly connected with the essential functioning of the parochial school itself. Furthermore, if the court really did subscribe to the view that any law which served a public purpose was permissible, it seems highly unlikely that it would have devoted such considerable attention to the history of the establishment clause. All it would have had to have done was to affirm on the authority of *Cochran* v. *Louisiana State Board of Education,* 281 U. S. 370 (1930). In *Cochran,* a number of citizens and taxpayers of Louisiana sued to restrain state officers from spending public funds for the purchase of textbooks for students attending religious schools on the ground that the laws authorizing such expenditures were repugnant to the state constitution and Article IV, Section 4 and the due process clause of the Fourteenth Amendment to the United States Constitution. No argument was made that the laws in question violated the First Amendment. Indeed, the Supreme Court had not yet determined, as it would ten years later in *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940), that the establishment clause of the First Amendment was applicable to the states. Accordingly, the case was decided on due process grounds alone. The holding was that for due process purposes a law appropriating money for textbooks for parochial stu-

dents did not constitute a taking of private property for a private purpose.

Had the *Everson* majority been ready to accept the due process test for the busing law, it surely would have accorded *Cochran* a significant, if not a decisive, place in its deliberations. Instead, the majority cited *Cochran* only once, and that was to counter the argument that the busing law served no public purpose at all. Indeed, the court's limited treatment of *Cochran* strongly suggests that the Court felt bound by the doctrine that the test of legislation which collides with First Amendment freedoms is much more definite than the test when only the due process clause of the Fourteenth Amendment is involved, and that First Amendment freedoms "are susceptible of restraints only to prevent grave and immediate danger to interests which the state may lawfully protect." *Board of Education* v. *Barnette*, 319 U. S. 624, 639 (1943). Justice Brennan echoed this doctrine in *Sherbert* v. *Verner*, 374 U. S. 398, 406 (1963), when he said:

> "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation,' *Thomas* v. *Collins*, 323 U. S. 516, 530."

Without citing a single authority, the majority in the court below nevertheless ruled that any program aimed at improving the quality of education in all schools is a matter of legitimate state interest, and that any aid "accruing to these schools is a collateral effect of the statute, and, therefore, cannot be properly classified as the giving of aid directly or indirectly" (A. 66). It has been shown, however,

that the due process test is not applicable to legislation which collides with First Amendment freedoms. Indeed, the view of the majority of the New York Court of Appeals cannot be correct. It would mean that a state could constitutionally underwrite the entire cost of parochial education, since all aid to parochial schools benefits their pupils.

B. Sectarian schools are religious institutions and textbooks are used by them in teaching their faiths and tenets.

We have seen that the majority in *Everson* viewed a sectarian school as a religious institution. This view was shared by the two dissenting opinions. Thus, after referring to the Canon Law of the Church relating to Catholic Schools by which all Catholics were bound,* Justice Jackson commented:

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*"'1215. Catholic children are to be educated in schools where not only nothing contrary to Catholic faith and morals is taught, but rather in schools where religious and moral training occupy the first place .... (Canon 1372.)'

'1216. In every elementary school the children must, according to their age, be instructed in Christian doctrine. The young people who attend the higher schools are to receive a deeper religious knowledge, and the bishops shall appoint priests qualified for such work by their learning and piety. (Canon 1373.)'

'1217. Catholic children shall not attend non-Catholic, indifferent, schools that are mixed, that is to say, schools open to Catholics and non-Catholics alike. The bishop of the diocese only has the right, in harmony with the instructions of the Holy See, to decide under what circumstances, and with what safeguards to prevent loss of faith, it may be tolerated that Catholic children go to such schools. (Canon 1374.)'

'1224. The religious teaching of youth in any schools is subject to the authority and inspection of the Church. The local Ordinaries have the right and duty to watch that nothing is taught contrary to faith or good morals, in any of the schools of their territory.

'They, moreover, have the right to approve the books of Christian doctrine and the teachers of religion, and to demand, for the sake of safeguarding religion and morals, the removal of teachers and books. (Canon 1381.)' (Woywod, Rev. Stanislaus, The New Canon Law, under imprimatur of Most Rev. Francis J. Spellman, Archbishop of NewYork and others, 1940.)" 330 U. S. at 22.

"I should be surprised if any Catholic would deny that the parochial school is a vital, if not the most vital, part of the Roman Catholic Church . . .

Catholic education is the rock on which the whole structure rests, and to render tax aid to its church school is undistinguishable to me from rendering the same aid to the Church itself." (330 U. S. at 24.)

And in the same vein, Justice Rutledge said:

"It is precisely because the instruction is religious and relates to a particular faith, whether one or another, that parents send their children to religious schools under the *Pierce* doctrine . . .

Indeed, the view is sincerely avowed by many of various faiths, that the basic purpose of all education is or should be religious, that the secular cannot be and should not be separated from the religious phase and emphasis. Hence, the inadequacy of public or secular education and the necessity for sending the child to a school where religion is taught. But whatever may be the philosophy or its justification, there is undeniably an admixture of religious with secular teaching in all such institutions. That is the very reason for their being." (330 U. S. at 46.)

There is no such thing as secular education in a sectarian elementary or secondary school. The whole curriculum is permeated by religion. If this were not the case, there would be no point in maintaining parochial schools. It would be far simpler to send children to public school for the secular courses and then after school to church for religious education.

Whereas, in *Everson,* the benefit was a non-educational benefit, separate and marked off from the educational function of the sectarian school, here the benefit is directly connected with the educational process taking place in the school. Transportation may take children to the door of a school, but textbook aid spills over into the classroom. Textbooks are an essential element of education. Indeed, a school cannot function without them. They are one of the three essential components of a school, the others being teachers and pupils.

As Justice Van Voorhis stated in his dissenting opinion in the court below, there is no reliable standard by which secular and religious textbooks can be distinguished from each other (A. 73). But even if it can be shown that particular textbooks do not embody religious symbols, concepts and doctrines, the fact remains that they are used in a place where the syllabus, the teacher and indeed the whole atmosphere is oriented toward religious goals. They are materials which, unlike reference books or books in general, are intended to be used by students under the guidance of the teacher, and not by the students alone. Their contents cannot be fully utilized until they have been subjected to the analysis and interpretation of the teacher. Furthermore, even if the particular textbooks do not promote religion, as such, they obviously enable the parochial schools to purchase religious books with the funds saved as a result of the supplying by the school boards of the non-religious texts.

Since textbooks are an integral part of the educational processes which take place in sectarian schools, and sectarian schools are religious institutions, then to the extent the state furnishes textbooks to be used in such schools it

promotes the teaching of religious concepts. If this is not support of religious institutions, then it is difficult to imagine what is. It is because it felt transportation does not support sectarian schools in teaching their tenets and faiths that the majority in *Everson* was unwilling to outlaw the aid. The same cannot be said of textbooks. The difference is one of kind, not one of degree.

C. The Textbook Law aids parochial schools and the mere fact that it also happens to aid their pupils does not render it permissible.

While they would readily concede that textbooks do aid parochial schools in teaching their faiths and perhaps even that a law which required textbooks to be furnished directly to parochial schools would be invalid, the appellees have contended that since the books are furnished to the pupils at their request and not to the schools, there's a constitutional difference. But wherein lies the difference? Pupils do not use textbooks apart from their studies in school. They need them solely for their work there. In the past, no one suggested or even thought that books which were furnished directly to public schools were furnished to the pupils as distinct from the schools. There is no reason to think so now, whether the school is public or private.

In reality, the only role a twelve-year old child can play in the selection of books to be used in his school courses is to act as a conduit for books which his teacher or school instructs him to obtain. The request may be made in the child's name, but it is the school's request, not the child's. If this were not the case, then the statute would have to be construed to permit a child to compel the local school board to purchase any approved book he wanted, for any purpose, a result which could hardly have been intended by

the framers of the law. In any event, the Legislature foreclosed this possibility by amending the law to define a textbook as one "which a pupil *is required* to use as a text for a semester or more in a particular class in the school he legally attends" (emphasis added). This made unmistakably clear that the child's request is a fiction. Viewed in this light, the Textbook Law is nothing but a transparent attempt to do indirectly what cannot be done directly.

If there were any doubt on this score, it would be dispelled by the interpretation placed on the statute by those who administer it. Shortly after the oral arguments on the motions for judgment in this case, counsel for the University of the State of New York, Education Department, issued and distributed to City, Village and District Superintendents of Schools and Supervisory Principals, Opinion of Counsel No. 181 relating to the interpretation and implementation of the Textbook Law. A copy of this Opinion is set forth as an appendix to this brief. Among other things, the Opinion advised (Par. 12) that while the statute called for pupil requests, the sectarian schools might keep such requests on file and forward merely a summary to the school board (Appendix to Brief, 9a). It also advised (Par. 15) that in considering any requests, it is incumbent upon the school board to examine the existing book stocks of the sectarian schools so as to avoid the duplication of textbooks owned by any of such schools (Appendix to Brief, 11a-12a), and (Par. 16 b) that textbooks used in parochial schools may be stored there under an agreement with the school board (Appendix to Brief, 13a). What the statute implies on its face is thereby confirmed by its implementation. Through its involvement in the administration of the statute, it is the parochial school which is the dominant consideration in the selection and distribution of the books, not the students.

The appellees here have urged and the majority in the court below agreed (A. 66), nevertheless, that the law should be upheld because it aids the pupils and not the parochial schools. This is an attempt to give vitality to the so-called "child benefit theory" which was advanced in *Borden* v. *Louisiana State Board of Education,* 168 La. 1005, 123 So. 655 (1929). In that case, four of the seven justices of the Louisiana Supreme Court were of the opinion that laws which appropriated public moneys to be used for purchasing textbooks for all students in the state should be construed as aid to the child and not aid to the parochial school so as to avoid the state constitutional ban on aid to sectarian institutions. While it is true that Justice Hughes quoted this portion of the *Borden* majority opinion in *Cochran* v. *Louisiana State Board of Education, supra,* which was a companion case to *Borden,* it is equally true that by implication at least all nine justices in *Everson* rejected this theory. Indeed, this theory received absolutely no mention in *Everson.*

D. The Textbook Law did not establish a constitutionally valid public library system.

In an attempt to refute the obvious fact that the parochial school is the primary and intended beneficiary of the statute, the majority in the New York Court of Appeals (A. 66), as well as the concurring justices in the Appellate Division (A. 55), urged that there is no constitutional difference between furnishing books under the Textbook Law and furnishing public library books. The purpose of a public library is to purchase a wide variety of books, most of which are not "textbooks" as that term is generally understood, and to make them available for a limited time to anyone in the library community. It is true, of course,

that consistent with this purpose public libraries lend books, some of which are used for school studies, to students from all schools. This system is constitutionally unobjectionable since the public libraries make the book purchasing decisions and lend directly to individual students without the intervention of parochial school officials. Public libraries, however, do not buy books at the order of religious authorities or permit exclusive utilization of books or a class of books by persons of a particular religious background or institution.

Under the Textbook Law, the choice of the particular books to be purchased from the comprehensive list for parochial school students is made by religious authorities. Indeed the only book available to the student according to the definition of textbook in the law is "a book which a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends". Once parochial school officials have decided on a particular biology or history text, neither the student borrower nor the public authorities have any discretion. Furthermore, the student's continued access to this book is contingent on maintaining enrollment in that particular parochial school which means he must meet religious as well as secular obligations. Finally, since the public officials are mandated by law to purchase particular books for students of a particular parochial school, these books are not then available to students from other schools or other religious backgrounds. No public library operates under these restraints or exacts these conditions. If a public library system instituted selection, purchase or lending procedures which in effect diverted its funds to the support of a sectarian institution, it too would be barred under the First Amendment.

On its face, then, the Textbook Law is constitutionally distinguishable from public library practice and constitutionally defective. In its implementation the Textbook Law bears even less resemblance to a public library system. The parochial schools order the books, they take delivery of them and they may store them when not in use. These books are in no realistic way available to the public.

E. Summary of establishment clause tax cases.

Although there are obvious difficulties in attempting to harmonize the cases dealing with the impact of the establishment clause on a state's power to tax, a rule does emerge which seems to be consistent with the history and development of the law on this subject. Stated in general terms, the rule is that if the particular public aid is earmarked for use by or within the confines of a religious institution in connection with functions associated with religion, then it is barred by the establishment clause. In short, the constitutionality of the aid turns on the nature of the benefit and how and where it is used. Thus, the aid in *Bradford* v. *Roberts,* 175 U. S. 291 (1899), was deemed permissible because the aid was used for medical care, which certainly cannot be considered a religious activity, and also because it was being used in a hospital which was run in a sectarian manner. The aid in *Quick Bear* v. *Leupp,* 210 U. S. 50 (1908), was also deemed permissible because the source of the funds was the Indian's own money, not the public treasury. And the aid in *Everson* was deemed permissible because it was not used within the confines of the parochial schools nor was it used for the teaching of religion. Similarly, the law does not prohibit the furnishing of traditional welfare benefits. Thus, for example, it is permissible for a state to provide in-school medical or

nursing care to parochial school pupils for the reason that such aid is not connected with functions associated with religion. On the other hand, textbook aid to parochial school students is forbidden. It is forbidden because the textbooks are earmarked for use by and within the confines of a religious institution in connection with the essential function of such institution which is the teaching of religion.

F. The *Everson* interpretation of the scope of the establishment clause has not been narrowed by any subsequent decision.

Although *Everson* was a tax case, it has been urged that in a series of non-tax cases after *Everson* the Supreme Court repudiated its holding in *Everson* that:

> "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."

The cases, themselves, however, lend no support to this view. In *Illinois ex rel. McCollum* v. *Board of Education of School Dist. No. 71, Champaign County, Illinois, et al.*, 333 U. S. 203 (1948), the Court was asked to limit the *Everson* interpretation of the scope of the establishment clause's coverage and rule that the First Amendment did not prohibit impartial government assistance to all religions. It refused to do so,

> "but instead strongly reaffirmed what had been said in *Everson*, calling attention to the fact that both the majority and the minority in *Everson* had agreed on the principles declared in this part of the Everson opinion . . . " *Torcaso, supra*, at 493.

Zorach v. *Clausen,* 343 U. S. 306 (1952), involved a released time program substantially the same as the *McCollum* program with one difference, namely, that the religious instruction was given outside the public schools. While the majority found this difference constitutionally significant, it did not repudiate the *Everson* interpretation as reaffirmed in *McCollum.* Indeed, the court's opinion specifically stated, at p. 315: "We follow the *McCollum* case."

In *McGowan* v. *Maryland,* 366 U. S. 420 (1961) and *Two Guys From Harrison-Allentown Inc.* v. *McGinley,* 366 U. S. 582 (1961), which were suits by merchants whose religious practices were not affected by Sunday Closing Laws, the Court said that the only issue was whether the purpose of the laws was to aid the conduct of religion. The Court reviewed the history of the Sunday laws and concluded that while originally the laws were motivated by religious forces, secular justifications for the laws began to evolve and these became paramount. It then held that since the laws were of a secular rather than a religious character it could not be said that their purpose was to aid the conduct of religion. In *Braunfeld* v. *Brown,* 366 U. S. 599 (1961) and *Gallagher* v. *Crown Kosher Super Market,* 366 U. S. 617 (1961), which were suits by merchants whose religious practices were affected by the laws, and where it was faced with the free exercise question as well, the Court concluded that while the laws undoubtedly made the practice of these merchants' religious beliefs more expensive, the laws were saved by a vital state interest in providing one uniform day of rest for everyone, which could only be achieved by declaring Sunday to be that day of rest.

As we have seen, a primary purpose of the Textbook Law to the extent it applies to parochial schools is to assist

such schools in teaching religion. In the *Sunday Closing Cases* the Court made emphatically clear that a law having this purpose is unconstitutional. The free exercise argument made in the *Sunday Closing Cases* is wholly inapplicable here. There it was argued that the *inclusion* of certain persons within the ambit of the law constituted an interference with free exercise of religion. Here it would have to be argued that the *exclusion* of parochial schools from the coverage of the law would constitute a denial of equal protection and a denial of religious freedom. While this is not properly an issue in this case, the answer to this is that the state is under no constitutional compulsion to treat sectarian schools the same as public schools. Not only is such classification reasonable, but it is required by the Constitution itself. Cf. *Dickman* v. *Oregon School District No. 62c,* 232 Ore. 238, 260, 366 P. 2d 533, 544 (1962), cert. den. sub nom. *Carlson* v. *Dickman,* 371 U. S. 823 (1962); *Swart* v. *South Burlington Town School District,* 122 Vt. 177, 167 A. 2d 514 (1961), cert. den. 366 U. S. 925 (1961).

The *Everson* interpretation was cited again with approval in *Engel* v. *Vitale,* 370 U. S. 421 (1962), wherein the court struck down the reading of a non-denominational Regent's prayer in public schools.

Abington School Dist. v. *Schempp,* 374 U. S. 203 (1963), concerned a law requiring all children, except those who were requested to be excused by their parents, to attend a Bible reading ceremony in school at the beginning of every class day. Having in mind the particular ceremony, the Court said, at p. 222:

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then

> the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the stricture of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

That this test was not intended to replace the *Everson* test is evidenced by the fact that *Everson* was cited with approval in every opinion written in the case. What is more likely is that the Court merely was rephrasing the *Everson* test in terms of the facts of the case.

Even if this test were deemed to be applicable here, the result would be the same. The *Abington* test contemplates that a law may have more than one primary effect. If, however, any one of these primary effects advances religion, then the law cannot stand. Thus,

> "Teaching world history to elementary school students in light of a particular religious tradition, for example, fulfills the functions of both acquainting the student with the facts of history and inculcating religious perspectives. The latter would be a 'primary effect' of such teaching and would render unconstitutional the extension of state support to this activity." *

In *Sherbert* v. *Verner*, 374 U. S. 398 (1963), a Seventh Day Adventist contended that the denial of workmen's compensation to her because she refused to accept an offer to work on Saturday, her Sabbath, interfered with the free exercise of her religion. The Court ruled that the appel-

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* Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part II The Nonestablishment Principle*, 81 Harv. L. Rev. No. 3, 513, 534 (Jan. 1968).

lant's declared ineligibility for benefits could be sustained only if it could be shown that it would prevent grave abuses, endangering paramount interests of the State. It went on to hold that no such abuses or dangers had been advanced. Then, as it had done so many times in the past, the Court declared that its holding reaffirmed *Everson.*

Not only are these cases consistent with *Everson,* but they too point to the conclusion that the Textbook Law to the extent challenged is invalid.

An analysis of these cases reveals that they fall into two groups. One group, which includes *McCollum, Zorach,* the *Sunday Closing Cases* (in part), *Engel* and *Abington,* consists of cases where the court considered the issue to be whether the particular law constituted an impermissible aid to religion.

The other group, which includes the *Sunday Closing Cases* (in part), *Sherbert* and *Torcaso* (which was not discussed but which involved a religious test oath for office), consists of cases where the court considered the issue to be whether the particular law interfered with the free exercise of religion.

In the second group of cases, the Court said that a law which interfered with the free exercise of religion could be saved provided it could be shown that it would prevent grave abuses, endangering paramount interest of the state. Presumably the Court had in mind here abuses similar in nature to those which justified the restraints in *Reynolds* v. *United States,* 98 U. S. 145 (1878), where the Court sustained a law prohibiting the practice of polygamy, and *Prince* v. *Massachusetts,* 321 U. S. 158 (1944), where the Court sustained a law prohibiting a nine-year old Jehovah

Witness from selling newspapers in public places. In the first group of cases, however, the court said that once it was shown that the purpose of the law was to aid religion, there were no saving considerations.

The main issue in the case at bar, as it was in *McCollum* and the other cases in the first group, is whether the purpose of the particular law is to aid religion. It has been shown that the purpose of the Textbook Law is to aid religion. Accordingly, there can be no saving considerations, and the law must fall.

G. Recent state court decisions are in accord with the appellants' views.

There have been a number of state court decisions on the constitutionality of furnishing textbooks to parochial school pupils, and apart from the decision of the New York Court of Appeals in this case there has been a definite trend away from the earlier decisions in *Borden* v. *Louisiana State Board of Education, supra,* and *Chance* v. *Mississippi State Textbook Board,* 190 Miss. 453, 200 So. 706 (1941), which upheld such practice.

In *Haas* v. *Independent School District,* 69 S. D. 303, 9 N. W. 2d 703 (1943), the Supreme Court of South Dakota construed a law providing free textbooks to pupils of a school district as applying only to public schools in order to avoid a finding that the law violated Article VI, Section 3 of the State Constitution which prohibited the appropriation of money or property for the benefit of any sectarian school. While the court preferred not to consider the constitutional questions which would have arisen had the statute been construed to cover all schools, it is interesting to note that in *Smith* v. *Donahue,* 202 App. Div.

656 (1922), the Appellate Division of the New York State Supreme Court, in considering a similar law, was willing to meet this issue. It said that if the statute were thus construed, it would violate a provision of the New York State Constitution, similar to the South Dakota ban on aid to church schools. The court rejected out of hand the argument that the books were to be supplied to the pupils and not to the schools. *Smith* was cited with approval in *Judd* v. *Board of Education*, 278 N. Y. 200 (1938), which the Court below refused to follow in this case (A. 65).

In *Zellers* v. *Huff*, 55 N. M. 501, 236 P. 2d 949 (1951), the Supreme Court of New Mexico ruled that the furnishing of textbooks to parochial school students not only violated Article XII, Section 3 of the State Constitution, which banned aid to sectarian schools, but also the First Amendment.

A law similar to the one in issue here was struck down in *Dickman* v. *Oregon School District No. 62c, supra*, the court holding that the law contravened Article I, Section 5 of the State Constitution which banned state aid "for the benefit of any religeous (sic) or theological institution." Among the significant features of the case were the court's rulings that the religious aspects of parochial school education are inseparable from the secular aspects, and that textbooks are an integral part of the educational process. Thus, the court found:

> ". . . the purpose of the Catholic Church in operating the St. Johns School and other similar schools under its supervision is to permeate the entire educational process with the precepts of the Catholic religion . . . [and] to some extent at least, the use of textbooks fur-

nished by the district is inextricably connected with the teaching of religious concepts." 232 Ore. at 243, 366 P. 2d at 536.

Finally, in the recent case of *Bowerman* v. *O'Connor* (Superior Court of Providence County, Rhode Island, Equity No. 31775), the court chose to follow *Dickman*, and not the New York Court of Appeals decision in this case and ruled* that a Rhode Island Textbook Law (R. I. Laws of 1963, c. 12) similar to the law at issue here violated the First Amendment as well as Article I, Section 3 of the State Constitution.

In *Bowerman*, the court took judicial notice of the fact that parochial schools are conducted by the various churches with strong emphasis upon religion and the teaching of religion. When it came to consider the First Amendment issue, the court said it was persuaded that *Everson* required a distinction to be drawn between aid which goes no further than the entrance to the school and aid which overflows into the school and contributes to what takes place inside. With respect to the Textbook Law, the court ruled:

> "Public funds are there expended for the essential functioning of the school itself, a school under religious auspices the support of which basically is banned by the First Amendment" (p. 29).

Like *Dickman*, the court saw no merit to the argument that the books were for the benefit of the child and not the school. After observing that this theory could be used to

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* References are to the unreported decision in the case.

require the equipment and maintenance of the entire parochial school educational plant (p. 29), the court pointed out that neither the furnishing of funds for the construction of parochial school buildings or for the payment of parochial school tuition has been countenanced, citing *Horace Mann League of U. S.* v. *Board of Public Works,* 242 Md. 645, 220 A. 2d 51 (1966), app. dism. 385 U. S. 97 (1966), and *Swart* v. *South Burlington Town School District, supra* (pp. 31 and 47).

POINT II

To the extent the Textbook Law requires textbooks to be furnished at public expense for use in religious schools, it violates the free exercise clause of the First Amendment because it compels a man to contribute to the propagation of opinions which he disbelieves, it creates the conditions under which the state may control religious education and it promotes a union of Church and State.

A. The law compels a man to contribute to the propagation of opinions which he disbelieves.

Both the majority and dissenting opinions in *Everson* observed that the seeds for the religious clauses of the First Amendment were planted in the Virginia debates which began in 1784 over a bill to renew a tax levy "for the support of the Christian religion, or some Christian church, denomination or communion of Christians, or for some form of Christian worship." The proponents of the bill had urged that its purpose was not to establish a religion, but in the words of the bill's preamble "to correct the morals of men, restrain their vices and preserve the

peace of society." Their attempt to save the religious establishment by masking the support of religion in the rhetoric of public purpose provoked one of the great documents on religious liberty, Madison's "Memorial and Remonstrance Against Religious Assessments." In the *Memorial and Remonstrance,* Madison urged that every man possessed an inalienable right to the free exercise of religion according to the dictates of conscience, and that religion was a private affair, exempt from state support or other interferences. He urged also that all men possessed a right to equality under the law and that a law which interfered with the free exercise of religion also violated this right, by subjecting some to burdens while granting others benefits.

Not only did this document rally opposition to the tax levy, but it led directly to the passage in 1786 of Jefferson's "Bill for the Establishment of Religious Freedom." The preamble to that Bill, proclaimed:

> "Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either . . . ; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher or his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern . . ."

And the Bill itself provided:

> "That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief . . ." *

No doubt, Jefferson's emphasis on coerced attendance and support of religion was a recognition that the power to coerce in these matters was a symbol of the long history of established religion and religious oppression. But it was also a recognition of the very special requirements for the full enjoyment of the rights of conscience and equality about which Madison spoke so eloquently. Forced attendance was clearly a denial both of freedom of religion and equality under the law. Forced support was no less obnoxious to these basic freedoms, for it too promoted an interdependence between religion and civil authority with its attendant evils. "Establishment" and "Free Exercise" were, then, merely two aspects of a single fundamental freedom, and it was this freedom that found expression in the First Amendment.

An astute commentator has noted that a man can witness to religious truth as he sees it only through freely contributing his time, his talents and his funds.** No one seriously contends that a state may force a man to attend

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* References to the proposed tax levy, the *Memorial and Remonstrance* and Jefferson's Bill are taken from the Appendix to Justice Rutledge's dissent in *Everson*, 330 U. S. at 63-74.

** George R. LaNoue, *Public Funds for Parochial School?* National Council of Churches (1963), p. 7.

church or to contribute his talents to a church. Compulsory attendance and forced observance of religious forms and ceremonies went out early in the process of separating church and state (Dissenting opinion of Justice Rutledge in *Everson*, 330 U. S. at 44). By the same token, our tradition is based on the premise that a state may not coerce a man to contribute his funds to a religious institution, or to do so through the medium of the state's taxing power.

Religious liberty cannot flourish unless religion remains a matter of conscience, free from state support and other interferences. As Justice Jackson forcefully stated in his *Everson* dissent,

> "This freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity. It was intended not only to keep the states' hands out of religion, but to keep religion's hands off the state, and, above all, to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse." (330 U. S. at 26.)

A state's use of its taxing powers to pay religious costs is a dangerous assault on this fundamental freedom. For, as Justice Rutledge observed in *Everson*,

> "Public money devoted to payment of religious costs, educational or other, bring the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one by numbers alone will benefit most, there another. That is precisely the history of societies which have had an established religion and dissident groups." (330 U. S. at 53.)

And as Justice Douglas said in *Engel:*

> "Once a government finances a religious exercise it inserts a divisive influence into our communities." (370 U. S. at 442.)

A prime illustration of the divisiveness which inevitably results when the state intrudes into essentially private affairs occurred just last year, when New Yorkers were asked to vote on a new constitution which contained, among many other provisions, a repeal of the constitutional ban on state aid to parochial schools. This church-state issue stirred passions as few others could.* But when the battle was over, the voters overwhelmingly rejected the entire proposed constitution by a margin of 3,360,613 to 1,308,472.

The money used to finance the Textbook Law is raised by taxation. To the extent books are furnished for use in a sectarian school operated by members of one faith, members of other religious faiths and non-believers are thereby forced to contribute to the propagation of opinions which they disbelieve. This is no less an interference with religious liberty than forcing a man to attend a church. And any interference with religious liberty was intended to be outlawed by the First Amendment.

The recipients of the aid are in no less danger of losing their freedom. For if a state may aid religious schools, then it may also regulate them. As Justice Jackson pointed out in *Everson*:

> "Many persons have sought aid from tax funds only to find that it carried political controls with it." (330 U. S. at 27.)

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* Andrew Hacker, "The 'Blaine Amendment'—Yes or No?," The New York Times Magazine, October 1, 1967, p. 27.

B. The law promotes a union of Church and State.

The Textbook Law also promotes just that sort of union between religion and secular authority which the First Amendment was designed to prevent. *Engel* v. *Vitale, supra,* at 430. Under the law, the parochial school instructs its pupils what books to request. It then forwards a summary of the requests to the school board. Upon receipt of the summary the school board checks the book stocks of the parochial school to insure against duplication of books owned by such school. Then the school board sends the books to the parochial school, which, if the school board sees fit, can store the books indefinitely.

As for the books themselves, the parochial school may order any book designated by any school board. This is an open invitation for any church whose adherents dominate any one of the 800 school districts in New York to see to it that the board of this captive district designates the books which reflect the church's point of view. Once that happens, schools operated by the same church in other parts of the state can request the same books. This, in turn, will create a pressure on the other faiths and the secular authorities to be equally zealous in promoting their views. Thus, sect will be pitted against sect and the secular authorities to control the selection of books. The net effect of all this will be to diminish the freedom of both school systems. As Justice Brennan commented in *Abington*:

> "The choice which is thus preserved is between a public secular education with its uniquely democratic values, and some form of private or sectarian education, which offers values of its own. In my judgment the First Amendment forbids the State to inhibit that freedom of choice by diminishing the attractiveness of

> either alternative—either by restricting the liberty of the private schools to inculcate whatever values they wish, or by jeopardizing the freedom of the public schools from private or sectarian pressures." (374 U. S. at 242.)

Pressures are a built-in feature of the Textbook Law. As Justice Van Voorhis observed in his dissenting opinion in the Court below,

> "If the state is to provide schoolbooks for instruction in 'secular' fields, which have inseparable religious connotations, and parochial schools become increasingly dependent upon the state money to provide textbooks, which are the life blood of education, this statute will create and foster a pressure to dominate the choosing of books that shall be used in the public schools (so that they may be used also in parochial schools) which will always be latent and at certain times and places, irresistible and, as action begets reaction, there will be an opposite tendency, equally dangerous, on the part of the state to dominate the church" (A. 75).

Through the use of the state's taxing power, the Textbook Law compels a man to contribute his money to aid the proselytizing and indoctrinating efforts of religious institutions. It creates the conditions under which the state can control the aid recipients. And, in its operation and through its built-in pressures it brings about a union of church and state. It would be difficult to imagine a law which more perfectly embodies the very essence of the evils which the First Amendment sought to eradicate.

A few other arguments made in this case deserve brief consideration. The intervenor-appellees have argued that if religious schools are denied public assistance, such as textbooks, they will be forced to close their doors in consequence of which the public school population will increase and so will the cost of public education. In view of the increase in the number of parochial elementary and secondary schools and the substantial investment in their maintenance, it is easy to doubt the sincerity of this appeal. But even if this doubt is put aside, it is clear that the financial burden on the public would be the same in either event. From the standpoint of cost, it makes absolutely no difference whether aid to education is routed through the parochial schools or is paid directly to the public schools. The vital difference between the two methods lies elsewhere. Where aid is paid directly to public schools, children receive their education in a neutral atmosphere in which many viewpoints are presented. At least if the public is to be required to pay the cost of educating all the children in the state, they should not be compelled to contribute to the maintenance and continuation of a school system in which sectarian influence is a primary consideration. On the other hand, a man who chooses to exercise his right to send his child to parochial school should and must bear the additional fiscal responsibility which arises upon the exercise of such right. The choice is his alone to make. But once he opts in favor of the increased burden, he cannot compel others to share it.

Intervenor-appellees have also argued that since they all paid for textbooks before the Textbook Law went into effect, the Textbook Law really aids them and not their parochial schools. It is submitted, however, that for constitutional purposes, it makes no difference that some schools include books in their tuition while others do not. In either case payment is required by the schools. The difference, if any, between the two methods is one of bookkeeping, not of substance. To the extent the state relieves parents of the obligation to purchase books, it reduces the cost of parochial education and thereby makes it easier for the parents to send their children to these schools and for the schools to recruit pupils.

CONCLUSION

It is respectfully submitted that the judgment below should be reversed and the order and judgment of the Supreme Court, Albany County, should be reinstated, except for the declaration therein that the Textbook Law violates the New York State Constitution.

Respectfully submitted,

MARVIN E. POLLOCK
Attorney for Appellants
80 Pine Street
New York, N. Y. 10005

ALAN H. LEVINE
Of Counsel

APPENDIX

APPENDIX

Textbook Law as Amended

§ 701. Power to designate text-books; purchase and loan of text-books; purchase of supplies

1. In the several cities and school districts of the state, boards of education, trustees or such body or officer as perform the functions of such boards, shall designate text-books to be used in the schools under their charge.

2. A text-book, for the purposes of this section shall mean a book which a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends.

3. In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities. Such text-books are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities.

4. No school district shall, during the school year nineteen hundred sixty-six-sixty-seven, the school year nineteen hundred sixty-seven-sixty-eight or the school year nineteen hundred sixty-eight-sixty-nine be required to purchase or otherwise acquire textbooks, pursuant to this section, the cost of which shall exceed an amount equal to fifteen dollars multiplied by the number of children residing in such district who on the first day of October, of such school year are enrolled in grades seven through twelve of a public or private school which complies with the compulsory education law, or in any subsequent school year be required to purchase or otherwise acquire textbooks, the cost of which shall exceed an amount equal to ten dollars multiplied by the number of children residing in such district and so enrolled on the first day of October of such subsequent school year; and no school district shall be required to loan textbooks in excess of the textbooks owned or acquired by such district; provided, however that all textbooks owned or acquired by such district shall be loaned to children residing in the district and so enrolled in grades seven through twelve in public and private schools on an equitable basis.

5. In the several cities and school districts of the state, boards of education, trustees or other school authorities may purchase supplies and either rent, sell or loan the same to the pupils attending the public schools in such cities and school districts upon such terms and under such rules and regulations as may be prescribed by such boards of education, trustees or other school authorities.

6. The commissioner of education, in addition to the annual apportionment of public monies pursuant to article

seventy-three of this chapter, shall apportion to each school district an amount equal to the cost of the text-books purchased and loaned by the district pursuant to this section, but in no case shall the aid apportioned to the district be in excess of the following amounts: a. on account of expenditures made during the school year nineteen hundred sixty-six-sixty-seven the school year nineteen hundred sixty-seven-sixty-eight or the school year nineteen hundred sixty-eight-sixty-nine an average of fifteen dollars per pupil residing in the district and enrolled in grades seven through twelve, and

b. on account of expenditures made in any subsequent school year an average of ten dollars per pupil residing in the district and enrolled in grades seven through twelve.

7. The apportionment provided for in this section shall be paid, at such times as may be determined by the commissioner and approved by the director of the budget, during the school year in which the expenditures are made to the extent that such expenditures have been made and reported to the department prior to such apportionment. Expenditures by a school district in excess of the average of fifteen dollars per pupil in the school year nineteen hundred sixty-six-sixty-seven, the school year nineteen hundred sixty-seven-sixty-eight or the school year nineteen hundred sixty-eight-sixty-nine or in excess of ten dollars per pupil in any subsequent school year shall be deemed approved operating expense of the district for the purpose of computation of state aid pursuant to subdivision five of section thirty-six hundred two of the chapter, but expenditures up to such average of fifteen dollars or ten dollars above mentioned shall not be deemed approved operating expenses for such purpose. As amended L.1965, c. 320, § 2; L.1966, c. 795, both eff. Sept. 1, 1966.

THE UNIVERSITY OF THE
STATE OF NEW YORK

EDUCATION DEPARTMENT

Opinion of Counsel No. 181

To: City, Village and District Superintendents of Schools and Supervising Principals

Re: Chapter 320 of the Laws of 1965 relative to the purchase and loan of textbooks, as amended by chapter 795 of the Laws of 1966

Chapter 795 of the Laws of 1966, effective September 1, 1966, amends chapter 320 of the Laws of 1965 which is also effective September 1, 1966.

As amended by these two chapters, Article 15 of the Education Law, entitled "Text-Books", now provides as follows:

1. *Designation of textbooks-public schools.*

There is no change in the previous provisions of the Education Law, Section 701, subdivision 1. Textbooks will continue to be designated by the school board or trustee, for use in the public schools.

2. *Change of designation of textbooks-public schools.*

Section 702 has not been amended by either of the above chapters, and hence the limitation on changes of designation of textbooks for the public schools continues in effect (changes in designation may be made only upon a three-fourths vote of the school board, or five years after designation).

3. *Subversive textbooks-public schools.*

Section 704, relating to subversive textbooks has not been amended by these chapters and likewise continues in effect without change, as does Section 705 relating to certain penalties.

4. *Definition—New law.*

Subdivision 2 of Section 701 defines the term "Text-Book", for the purpose of Section 701 only, as "a book which a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends". Reference books, workbooks, novels and other fiction, review books, test materials, materials in kit form and other supplementary books and material are not text-books and may not be furnished.

5. *Power and duty to purchase and to loan.*

Subdivision 3 of Section 701 requires all school boards to purchase and to loan, "upon individual request", text-books as defined above, to all children residing in the district who are attending grades seven through twelve in any public school and in any non-public school which complies with the Compulsory Education Law.

6. *Limitations on kinds of textbooks.*

In order for the mandate set forth in 5 above to become applicable, it is necessary that

a. The textbook be non-sectarian (this eliminates denominational editions and those carrying the "imprimatur" or "nihil obstat" of a religious authority), and

b. The textbook had been "designated for use in any public elementary or secondary schools of the State or . . . approved by any school board".

c. In case of doubt as to a. above, the school board must make the appropriate determination; and in case of doubt as to b. above, the school board should make appropriate inquiries from the school board concerned, or else decide if it wishes to approve the same itself.

7. *Fees and charges.*

Section 701, subdivision 3, requires that the textbooks be "loaned free" to the children, but authorizes school boards to make reasonable rules and regulations. Such rules and regulations may contain requirements for reimbursement, by the student to the school district, for damage, loss or destruction of loaned textbooks.

8. *Limit on requirement to purchase.*

a. Subdivision 4 of Section 701 states that no district, during 1966-67, 1967-68 or 1968-69, will be required to purchase or otherwise acquire textbooks, under this section, at a total cost to the district in excess of $15 multiplied by the total number of resident students in grades 7-12, of public schools and private schools which comply with the provisions of the Compulsory Education Law, i.e., which provide at least substantially equivalent educational services and facilities (in the judgment of the school board of the district of location of the non-public school) as the public schools of the district of location provide.

b. Textbooks need be, and may be, purchased only for resident pupils. Textbooks for children attending a school

located in one district, but which children reside in another school district, must be provided by such other school district. Textbooks need not be provided for pupils residing in a school district in this State, but attending a non-public residential school in another State.

c. The term "otherwise acquired" textbooks, which term does not appear in the basic mandate "to purchase and to loan" (Section 701, subdivision 3) merely authorizes the acquisition, in compliance with the statute, as amended, by gift, or by consolidation of school districts, or by centralization occurring after September 1, 1966.

d. Subdivision 4 of Section 701 further states that no district *during 1969-70* or during any subsequent school year will be required to purchase or otherwise acquire textbooks under this section at a total cost to the school district in excess of $10 multiplied by the total number of resident students in grades seven through twelve of public and appropriate non-public schools.

e. For the purpose of this limitation on the requirement to purchase (or otherwise acquire) in 1966-67 and thereafter, the resident enrollment of public and non-public students in grades seven through twelve must be ascertained as of October 1 of each such year. An increase or decrease of enrollment after such date will have no effect on the requirements of the statute.

f. It must be noted that subdivision 4 of Section 701 does not *require* any district to expend *at least* $15 (or $10) multiplied by the appropriate enrollment. The provision states in effect that even if the needs as resulting from other provisions of the statute are greater than that limitation, nevertheless no district need spend more than such limitation (see 15. below).

9. *Summer school.*

There is no requirement that a board purchase textbooks specifically for use at summer school; however, books may be loaned to the extent that they are on hand.

10. *Purchase of textbooks.*

Purchase orders for textbooks need to be awarded after competitive advertising to the lowest bidder, pursuant to General Municipal Law, Section 103 (unless a specific textbook can be procured only from the publisher in which case the competitive bidding procedure is not required).

Where students have been purchasing their own textbooks, the school board, if it wished to do so and considered this a wise procedure, could purchase such books from the individual students.

11. *Textbook purchases are ordinary contingent expenses.*

a. While the statute, unlike the transportation section, does not expressly so state, textbook purchases under this statute are clearly ordinary contingent expenses.

b. This is true, even where a board of education purchases textbooks in excess of the dollar amount mandated by subdivision 4 of Section 701, since the *power* to purchase is expressly vested in the school board and the limitation of subdivision 4 applies only to the *duty* to purchase.

c. Hence, in cases where budgets are defeated by the voters, the board nevertheless has the duty to purchase up to the requirement, and has the power to purchase in excess of the mandate.

d. Likewise, in those cases where district budgets have been adopted at annual meetings in 1966, the school boards

will nevertheless be required and authorized to make books available in September of 1966, irrespective of the amount contained in the budget.

12. *"Upon individual request"*:

Under the statute, both the power and the duty to purchase and loan textbooks depend upon individual requests to the school board for such textbooks.

In compliance therewith, the nonpublic school could either forward such individual pupil requests to the school board collectively or keep such requests on file and forward merely a summary of the requests to the board of education. In any event, however, the requests of each student must be addressed to the board of education of the district of residence.

13. *Date of payment for textbooks.*

The amendments to the Education Law under which the new procedure is authorized and required, do not become effective until September 1, 1966. Hence, no payments for textbooks ordered under the new law can be made prior to such date.

While the effective date section of the bill makes no specific exception to this effect, textbooks may nevertheless be ordered prior to the effective date.

14. *State aid.*

a. Subdivision 6 of Section 701 provides that school districts will receive an additional amount of State aid "equal to the cost of the textbooks purchased and loaned by the district pursuant to this section, but in no case . . . in excess of the following amounts: a. On account of ex-

penditures made during the school years 1966-67, 1967-68 and 1968-69, an average of $15 per pupil residing in the district and enrolled in grades 7-12, and b. on account of expenditures made in any subsequent school year an average of $10 per pupil residing in the district and enrolled in grades 7-12."

b. This means that districts will need to ascertain the total amount of money spent during each of these years for the purchase of textbooks loaned to students under the statute; thereafter the district will need to multiply the amounts of $15 and $10 respectively by the total number of resident students in grades 7-12 *as of October first* and the smaller of these two amounts (expenditure or ceiling) will be the amount of the special State aid due under subdivision 6.

c. Thereafter the amount, if any, resulting by deducting the amount of special aid arrived at under b. above, from the actual amount expended by the district for the purchase of textbooks, is added to the amount of approved operating expenses of the district pursuant to Education Law, Section 3602, subdivision 5.

d. The special aid under subdivision 6 (see b. above) is payable during the school year in which the expenditures are made to the extent that such expenditures have been made *and* reported to the Department prior to a date to be set jointly by the Commissioner and the Director of the Budget (which will be announced).

e. Aid payable under c. above, if any, becomes payable during the school year following the year of expenditure, as is all other operating expense under subdivision 5 of Section 3602, unless the district receives its operating ex-

pense aid under that subdivision, as amended by Chapter 767 of the Laws of 1966, on the budget basis. In such case operating expense aid, including the amounts here involved, will be paid currently, subject to adjustments the following year.

f. The expenditures for textbooks not exceeding the mandate are not aidable under subdivision 5 of Section 3602.

g. If a district issues bonds or notes for the purpose of financing the purchase of textbooks under the statute, the State aid payments will need to be made currently based on debt service payments of the district. In such case the "expenditure" (meaning an expenditure from local district funds) would not be made until debt service is paid and hence the "expenditure" would be made, for instance, during 1967-68 if the books are purchased from the proceeds of obligations in 1966-67 and the first debt service payment is due in 1967-68. Consequently, the aid payment would be $10, rather than $15, multiplied by the appropriate enrollment figures, if the "expenditure" is made during the school year 1969-70, and the obligations are issued during 1968-69.

15. *Procedure.*

a. The first step for a district to take is to ascertain the needs of the public and non-public students, as expressed by requests for loan of textbooks, in the various subjects. This will result in finding the number of books needed in each subject.

b. The number of books needed in each subject then must be checked against existing book stocks. It is obvi-

ously unnecessary to duplicate textbooks owned by any of the schools involved and available for the respective student's use.

Existing book stocks and newly to be purchased textbooks will need to be distributed among the respective students on an equitable basis.

c. Having ascertained the number of textbooks needed in each subject, the total amount necessary to purchase all textbooks must then be checked against the limitation on mandated expenditures for the appropriate school year, as contained in subdivision 4 of Section 701 (see 8. above).

d. Unless the necessary dollar amount is within that limitation, the board of education will then need to decide whether it wishes to exceed such limitation (as indicated in 11. above, no vote of the district is necessary for this purpose).

e. If the amount needed is in excess of both the limitation and the amount by which the school board is willing to exceed that limitation, the board will need to determine how to utilize the funds thus available in order to best meet the needs of the pupils as expressed by the requests received, on an equitable basis. Since a board of education may not discriminate between individual students in either the public or the non-public schools it is suggested that in such case the board determine how many categories of textbooks (such as science, mathematics, social studies, etc.) can be loaned free to both public and non-public pupils within the dollar amount thus available. Categories of textbooks not so included will then need to be purchased by the students themselves (unless other sources of funds are available).

16. *Accounting and storage.*

a. All books remain the property of the school district and must be treated as such. Such ownership should be indicated in or on each book by labels or other appropriate methods of identification.

b. There is no reason why textbooks used in a non-public school could not be stored in that school under an agreement with the school board and the governing body of the non-public school. The district may not, however, pay storage charges to non-public schools in this connection.

17. *Textbooks for grades 1 through 6.*

Section 703 of the Education Law (as amended by chapter 320 of the Laws of 1965) authorizes the qualified voters of common, union free, central and central high school districts, to vote a tax at an annual or special meeting for the purpose of providing free textbooks to all pupils enrolled in grades 1 through 6 of the public schools of the district. (City School Districts have their own provisions: §§2503, subd. 7 and 2854, subd. 7.)

18. *Supplies.*

Subdivision 5 of Section 701 authorizes school boards to purchase supplies and either to rent, sell or loan the same to the pupils in the public schools on appropriate terms and conditions.

19. *Legal questions.*

Any questions relating to the interpretation of Article 15 of the Education Law, as amended by both chapter 320 of the Laws of 1965 and chapter 795 of the Laws of 1966 should be addressed to the Office of Counsel or to the Law Division.

Sincerely yours,

/s/ CHARLES A. BRIND
Charles A. Brind

July 8, 1966

SUPREME COURT, U. S.
MAR 5 1968
JOHN F. DAVIS, CLERK

No. 660

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

Board of Education of Central School District No. 1 Towns of East Greenbush, Nassau, Schodack, Sand Lake and North Greenbush, Rensselear County and Chatham, Columbia County and Board of Education of Union Free School District No. 3, Towns of North Hempstead and Oyster Bay, Nassau County, New York,

Appellants,

v.

James E. Allen, Jr. as Commissioner of Education of the State of New York,

Appellee,

and

Michael Rock, Anthony Divileski, Peter Girzone, Doreen Beaudin, Charles Haigh and Barbara Brennan,

Intervenor-Appellees

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF PROTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS AMICUS CURIAE

FRANKLIN C. SALISBURY
1815 H Street, N. W.
Washington, D. C. 20006

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Intervenor-Appellees

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF PROTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

Protestants and Other Americans United for Separation of Church and State is a nonprofit, educational corporation organized under the laws of the District of Columbia and is a national organization of over 100,000 members interested in the preservation of civil rights arising from the constitutional principle of separation of church and state and the preservation of religious liberty as guaranteed under the religious clauses of the state and federal constitutions. "Americans United" and many of its members have suits pending in various courts seeking redress for alleged infringements against their constitutional right as citizens and taxpayers to be free of "establishment."

STATUTE INVOLVED

Sec. 701, Subdivision 3 of the New York Education Law, as amended L. 1965, C. 320, § 2; L. 1966, C. 795, 16 McKinney's Consol. Laws of New York, 701.3.

THE QUESTION PRESENTED

Whether Sec. 701.3 of the New York Education Law, insofar as it provides for the purchase of textbooks with public moneys to be lent to pupils enrolled in grades 7 to 12 of chruch-related schools violates the establishment or free exercise clauses of the First Amendment to the Constitution of the United States of America.

STATEMENT OF THE CASE

The Board of Education of the Central School District No. 1, towns of East Greenbush, Nassau, Schodack, Sand Lake and North Greenbush, Rensselaer County and Chatham Columbia County, and the Board of Education of Union Free School District No. 3, towns of North Hempstead and Oyster Bay, Nassau County, New York, commenced this action in the Supreme Court of the State of New York for Albany

County on April 29, 1966. The relief sought in the amended complaint was a judgment declaring Sec. 701.3 of the New York Education Law, insofar as it provides for the purchase of textbooks with public moneys to be made available free to pupils attending church-related schools, to be a violation of Article XI, Sec. 3, of the New York State Constitution and the religious clauses of the First Amendment to the United States Constitution.

The plaintiffs ask that the defendant be enjoined from implementing the law with regard to textbooks for church school students. The plaintiffs, as members of boards of education, are concerned since Secs. 306 and 1706 of the Education Law provide that any member of a school board who fails to comply with any section of the Education Law is subject to removal from office by the commissioner of education, and further that the commissioner of education may withhold public moneys from any school district whose school board fails to comply with any section of the Education Law. The plaintiffs believe that Sec. 701.3 of the New York Education Law for the purchase of textbooks at public expense for use by pupils enrolled in church-related schools would violate both the state and federal constitutions which they are sworn to uphold. Failure to purchase the textbooks and distribute them to pupils at church-related schools would subject them to dismissal from office and threaten their school district with the loss of state funds. The plaintiffs filed suit to clarify the law and protect their livelihood and their school districts.

Justice T. Paul Kane of the Supreme Court of the State of New York for Albany County held the statutory provisions to be unconstitutional (51 Misc. 2d 297, 273 N.Y.S.2d 239). In the New York State Supreme Court, Appellate Division, Third Judicial Circuit, Justice J. Clarence Herlihy held that the plaintiffs had no "standing" or "status" to bring the action. Two justices concurred in the result but decided the appeal on the merits. (27 A.D.2d 69, 276 N.Y.S.2d 234) Finally, on appeal to the highest court of

New York, the State of New York Court of Appeals, Justice Scileppi reached the merits of the case and held that the legislation in question did not violate either the state or federal constitutions. (20 N.Y.2d 109, 281 N.Y.S.2d 799, 228 N.E.2d 791)

SUMMARY OF ARGUMENT

Religious liberty and freedom of worship are two important fundamentals of the American way of life protected by the Constitution of the United States as interpreted by this court. These principles are not to be subverted by slight-of-word tricks of legislative draftsmen. Our written Constitution is a blueprint on which the foundations of our intricate and successful society is thoughtfully based. There is no room for laws which while giving the appearance of conformity with the basic constitutional design, in fact, result in a destructive undermining of the whole structure. Sec. 701 Subdivision 3 of the New York Education Law while dressed up with a false facade of constitutionality inevitably results in the eroding away of the guarantees of freedom from establishment and freedom of worship found in the religious clauses of the First Amendment to the United States Constitution. Whatever the motive, or the stated purpose of the Act, it results in direct aid to church-related schools in carrying out their educational function by furnishing books at public expense, heretofore often furnished at church expense, to students at church-related schools. A state law having this effect violates the religious clauses of the First Amendment to the United States Constitution and is a step towards the establishment of religion at the expense of the taxpayer no matter how cleverly written.

Robert G. Dixon, Jr., in his informative article "*Religion, Schools and the Open Society*" (13 Journal of Public Law, No. 2, p. 306 (1965)) points up the grave impact on the American way of life involved in efforts to bring state and federal support to churches and their schools. Insofar as the "American way of life" is structured in rights of the

individual by the Bill of Rights of the federal constitution individuals have a right to seek protection of those rights in this court and this court has a duty to protect the individuals as well as the society as a whole.

> "The great threat to continuation of the separation of the church and state tradition, and the open society values which are vitally associated with it, lies not in such things as recitation or nonrecitation of prayers in public schools, religious observances in their public place, or exemption from some public norm or duty on ground of religion. The threat lies rather in a disposition toward self-segregation, and in claims for public support, on the part of sectarians. A society in which there are schools, scout troops, and youth or welfare organizations existing simply as such, without special identification or division, is one kind of society. A quite different kind of society results if these same components, or a substantial percentage of them, become self-consciously hyphenated and take on an identity as a Roman Catholic school, a Lutheran scout troup, or a Jewish welfare program. We do not want the psychology and philosophy of Quebec to spread sectionally and cross-sectionally across all American life and institutions. An oppressed minority can be expected to stick together and to ghettoize because of external pressure and nonacceptance. Persistence in such practices after there has been a flowering both of numbers and acceptance is to violate the moral command of Kant's categorical imperative. It is to pursue a policy which, if pursued by all, would result in the destruction of the open and common society we have known." (p. 306)

ARGUMENT

The Establishment Clause of the First Amendment to the United States Constitution made applicable to the States by the Fourteenth Amendment forbids a State from employing its facilities or funds in a way that gives any church greater strength in our society than it would have by relying on its followers.

The subdivision of the Education Law of New York, the constitutionality of which is under question in this litigation, provides that a state board of education and similar public bodies:

> ". . . shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text books . . ."

The plaintiffs, certain boards of education in New York State, seek a judgment declaring the above-mentioned portion of the law unconstitutional and a restraint on its implementation by defendant. The defendant commissioner moved to dismiss the complaint on several grounds. Amicus restricts its argument to the validity of the statute on First Amendment grounds.

It is clear that the statute results in the lending of school textbooks to pupils at church-related schools. No other result can be expected unless this court finds that under the federal constitution the applicability of the statute is limited to public and private schools which are not church related, or which do not have as a purpose the advancement of religion. So limited there is no constitutional objection to the statutory plan.

Amicus doubts that the legislators had any but church-related schools in mind, but this court can assume that the act was written with the religious clauses of the federal constitution in mind. Such being assumed, the act cannot be interpreted to permit the lending of textbooks at public

expense to church-related schools so as to aid such schools in carrying on their educational task. It is the basic plan of our constitutional government that religious education is beyond the power of the federal and state governments. Religious education is permitted, perhaps even encouraged, but the direction and financing of such efforts are the sole prerogative of the churches or religiously motivated persons whose faiths are involved.

This court has been articulate in clarifying the meaning of the religious clauses of the First Amendment which provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." (Amendment 1 - U. S. Constitution). This court has stated that the "great liberties insured by the First Article" occupy "a preferred position in our basic scheme." *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944).

If one is to assume the "integrity" of the legislature which adopted the act in question, then one must accept the premise that the legislators did not mean to legislate contrary to the restrictions of their state and the federal constitutions. The legislators took an oath to abide by these constitutions. One must assume that they meant to live up to this obligation and that therefore the act which they adopted does not mean to provide for furnishing textbooks at public expense so as to assist church-related schools in carrying on their educational functions. One should read Section 1 of Chapter 320 of the Laws of 1965 (New York) as follows:

> "It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense, and the general welfare of the state [leaving to religious groups the carrying out of religious education programs which are important to God]". Material in brackets supplied - (N. Y. Sess. Laws 1965, c 320, § 1).

This reading of policy would be consistent, beyond any doubt or argument, with the oath of office of the drafters.

In keeping with the declaration of a policy which reads in the constitutional mandates and limitations of the state and federal constitutions, Education Law § 701, subd. 3 then would permit the appropriate school authorities:

> ". . . to purchase and to loan upon individual request to all children . . . who are enrolled in grades seven to twelve of a public or [secular] private school which complies with the compulsory education law, textbooks. Textbooks loaned to children enrolled in grades seven to twelve of said [secular] private schools shall be textbooks which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees, or other [public] school authorities. Such textbooks are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other [public] school authorities." Material in brackets supplied.

Read, with the constitutional limitations spelled out, the act in question would be consistent with the limitations on state action in the field of religion to be found in the religious clauses of the First Amendment.

No one will argue today but that the First Amendment's mandate against establishment of religion has been made applicable to the states by the Fourteenth Amendment. Mr. Justice Clark in *School District of Abington Tp. Pa. v. Schempp*, 374 U.S. 208 (1963), clearly outlined the findings of this court on the law of a case such as this:

> "Twenty-three years ago in *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S. Ct. 900, 903, 84 L. Ed. 1213 (1940), this Court, through Mr. Justice Roberts, said:
>
> 'The fundamental concept of liberty embodied in that [Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment. The First

Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.'

Second, this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another. Almost 20 years ago in Everson, supra, 330 U.S., at 15, 67 S.Ct., at 511, 91 L.Ed. 711, the Court said that '[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.' And Mr. Justice Jackson, dissenting, agreed:

'There is no answer to the proposition * * * that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. * * * This freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity.' Id., 330 U.S., at 26, 67 S.Ct., at 516, 91 L.Ed. 711.'

Further, Mr. Justice Rutledge, joined by Justices Frankfurter, Jackson and Burton, declared:

'The [First] Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.' Id., 330 U.S., at 31-32, 67 S.Ct., at 519, 91 L.Ed. 711.

The same conclusion has been firmly maintained ever since that time, see Illinois ex rel. McCollum, supra,

333 U.S., at pp. 210-211, 68 S.Ct., at pp. 464-465, 92 L.Ed. 648; *McGowan v. Maryland*, supra, 366 U.S., at 442-443, 81 S.Ct., at 1113-1114, 6 L.Ed. 2d 393; *Torcaso v. Watkins*, supra, 367 U.S., at 492, 81 S.Ct., at 1682-1683, 1684, 6 L.Ed. 2d 982; and we reaffirm it now." (pp. 215-217)

In 1947, the Supreme Court of the United States set forth in *Everson v. Board of Education*, 330 U.S. 1 (1947), the minimum scope or meaning of the establishment clause of the First Amendment as follows:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State'." (pp. 15-16)

The establishment clause of the Bill of Rights was based upon the awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand and on the belief that a union of government and religion tends to destroy government and degrade religion. *Engel v. Vitale*, 370 U.S. 421.

It would be more realistic to accept that the New York State legislators, in adopting the legislation in question, have

as a purpose a desire to aid Roman Catholic parochial schools to educate children so as to relate to God. Such an objective is so dear to the hearts of God-fearing Christians of the Roman Catholic persuasion that it is conceivable that they would put their religious convictions above constitutional limitations. In addition, such an objective might persuade some legislators to stretch the words of the Constitution to cover their good intentions. Recently, in Michigan, Representative Thomas L. Brown (R-Lansing) is quoted in the *Grand Rapids Press*, February 14, 1968 in connection with a "nonpublic school aid bill," that it is "stretching pretty close to the constitutional line" separating church and state. "But we'll leave that up to the courts to decide." When legislators give up the practice of calling "church-related schools" "non public schools" the credibility gap will be substantially narrowed. Till then the fig leaf of jesuitical legislative draftsmanship must be lifted to identify the sects involved.

The limitations of the religious clauses of the First Amendment were not designed to protect the society from the neutral but from the religiously dedicated. The "credibility gap" which strains our contemporary society results as often from the carelessness of those who would do "good" as from the malevolence of those who would do "bad." No matter how one feels about the motives of the legislators or how concealed in guile is the purpose of the legislation, the primary effect of this legislation is to aid church-related schools in carrying out their religious educational functions. Without this aid some students might have left the church schools to attend public schools. But public schools are also designed to aid children. Assuming that public schools are performing their task of educating children the only loss would be to church schools, not to the pupils, for the pupils would continue their education in the state schools. This loss of possible aid to religion by taxpayers is the price that churches pay for religious liberty and the right to undertake religious education. It is a modest price for so great a privilege.

There is no reason why this court may not take into consideration the "purpose" and primary effect of the act in question. Mr. Justice Clark in *Schempp* provided a test useful in determining whether or not a statutory enactment withstands the strictures of the establishment clause:

> "The test may be stated as follows: What are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Abington School District v. Schempp*, 374 U.S. 203, at 222.

In the same case in his concurring opinion Mr. Justice Douglas emphasized:

> "The most effective way to establish any institution is to finance it, and this truth is reflected in the appeals by church groups for public funds to finance their religious schools." Id. at 229.

Mr. Justice Clark's test was amplified by the Justice himself in *Religion and the Law*:

> "The phrase 'respecting the establishment of religion' prohibits situations where the church and state are one; where the church may control the state and vice versa; and where there is some working arrangement between the two . . . Finally, the term includes the furnishing of funds for facilities by the state where the program and primary effect is to advance religion," 15 SC. L. Rev. 855, 859 (1963).

The "rationalization" often relied upon to describe the patently unconstitutional as constitutional in the field of church-state relations is the so-called "child benefit" theory. It argues that if it can be said that government aid is beneficial to the child then aid to a church concurrent with a benefit to a child is not prohibited by the "establishment clause" of the federal constitution. The "child benefit"

theory saw the light of day in Louisiana under the then leadership of Huey Long. Despite a provision in the Louisiana Constitution that "No public funds shall ever be used for the support of any private or sectarian schools," (La. Const. Art. XII, Sec. 13) the Louisiana Legislature provided for textbooks for all students in the state, regardless of the schools attended. (La. Acts (1928), No. 100, 143) When the case, *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930), reached this court it did not come on First Amendment grounds but on the Fourteenth Amendment's protection against the taking of private property for public use. This court merely agreed with the opinion of the state court that the statute benefited all the children of the state no matter which school they attended, and that the taxpayer funds used were expended for a public rather than a private purpose.

The next case in which the "child benefit" theory was important was *Everson v. Board of Education*, 330 U.S. 1 (1947). The State of New Jersey authorized the reimbursement of parents for expenses in sending their children to public and church schools. There was no reimbursement or other financial reimbursement to the church school; there was no working arrangement between the church and the state – only between the state and the parents. In these circumstances the court held that it was the child not the state that was aided. While setting forth a comprehensive resume of sound church-state relations, previously quoted, it permitted state reimbursement of the parent for transportation to a parochial school. This gave strength to the "child benefit" argument, which since has been as generously rejected as the sound definition of church-state relations in *Everson* has been accepted (cf. *McCollum v. Board of Education*, 333 U.S. 203 (1948); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Torcaso v. Watkins*, 367 U.S. 488 (1961).

The state supreme courts when faced with the sophistic "child benefit" theory have not been persuaded. The theory is thoroughly discussed in *Dickman v. School District*, 232 Ore. 238, 366 P.2d 533 (1961), which in turn discusses

other leading state cases wherein the argument is rejected – *Gurney v. Ferguson*, 190 Okla. 254, 122 P.2d 1002, *Judd v. Board of Education*, 278 N.Y. 200, 15 N.E.2d 576 (1938), and *Mathews v. Quinton*, 362 P.2d 932 (Alaska 1961). The Oregon Supreme Court pointed out in the *Dickman* opinion:

> "This so-called 'child benefit' theory has been applied in other cases in which the expenditure of public funds is made for the purpose of meeting the educational needs of pupils, including those attending parochial schools. The difficulty with this theory is, however, that unless it is qualified in some way it can be used to justify the expenditure of public funds for every educational purpose, because all educational aids are of benefit to the pupil." (pp. 539-540)

The Oregon Court cites Robert F. Cushman, *Public Support of Religious Education in American Constitutional Law*, 45 Ill. L. Rev. 333 (1950), emphasizing: "The difference between providing police protection and providing teachers does not lie in the identity of the beneficiary but in the way the aid is extended." (p. 348)

> "The Constitution, according to the Court, does not forbid all aid to religious institutions. They may receive fire and police protection. What the Constitution forbids is aid to the religious function, and the Court in the *Everson* case divided over the question whether this function was in fact being aided. This being the case, *if a state wished sincerely to protect the safety of its children, it could set up children's busses on which any child could ride, whether going to a parochial school or the movies*. . . . To improve their minds and morals *it could provide free books*, museums and 'libraries.' *These aids would be available to all children regardless of the school they attended*, or whether or not they attended school. The aid would truly be to children (a group which the state may validly aid) irrespective of the religious activity of the individual. . . . *When, however, the state undertakes to aid just pupils and schools it is no*

longer aiding all children and all buildings. . . ." (pp. 348, 349) (Emphasis supplied)

Amicus argues that the so-called "child benefit" theory should be limited to situations where the benefit to the child is genuinely paramount and is not being advanced as a "subterfuge" to evade constitutional strictures against government aid to churches and church-related institutions and that this court should adhere to the "durable First Amendment philosophy" which Mr. Justice Douglas attributed to Justice Rutledge in his concurring opinion in *Engel v. Vitale*, 370 U.S. 421 (1962):

> "There cannot be freedom of religion, safeguarded by the state, and intervention by the church or its agencies in the state's domain or dependency on its largess . . . The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state. For when it comes to rest upon that secular foundation it vanishes with the resting . . . Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one by numbers alone will benefit most, there another. That is precisely the history of societies which have had an established religion and dissident groups. . . . It is the very thing Jefferson and Madison experienced and sought to guard against, whether in its blunt or in its more screened forms. . . . The end of such strife cannot be other than to destroy the cherished liberty. The dominating group will achieve dominate benefit; or all will embroil the state in their dissensions." (p. 444)

CONCLUSION

For the reasons stated, Amicus respectfully prays this court to reverse the decision of the court below and grant the relief sought by the appellants.

Respectfully submitted,

FRANKLIN C. SALISBURY
Attorney for Amicus Curiae

IN THE

Supreme Court of the United States

October Term, 1967

Office-Supreme Court, U.
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No. 660

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACH, SAND LAKE AND NORTH GREENBUSH, RENSSELAER COUNTY AND CHATHAM, COLUMBIA COUNTY AND BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3, TOWNS OF NORTH HEMPSTEAD AND OYSTER BAY, NASSAU COUNTY, NEW YORK,

Appellants,

v.

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York,

Appellee,

and

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH and BARBARA BRENNAN,

Intervenor-Appellees.

Appeal from the Court of Appeals of the State of New York

BRIEF OF AMERICAN JEWISH COMMITTEE, AMERICAN JEWISH CONGRESS, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, CENTRAL CONFERENCE OF AMERICAN RABBIS, JEWISH LABOR COMMITTEE, JEWISH WAR VETERANS OF THE U. S. A., NATIONAL COUNCIL OF JEWISH WOMEN, UNION OF AMERICAN HEBREW CONGREGATIONS AND UNITED SYNAGOGUE OF AMERICA, *AMICI CURIAE*

LEO PFEFFER
15 East 84th Street
New York, New York 10028

ARNOLD FORSTER
315 Lexington Avenue
New York, New York 10016

EDWIN J. LUKAS
165 East 56th Street
New York, New York 10022

HOWARD M. SQUADRON
32 East 57th Street
New York, New York 10022

EUGENE L. SUGARMAN
50 Broadway
New York, New York 10004

Attorneys for Amici

LEO PFEFFER
THEODORE ELLENOFF
PAUL HARTMAN
SAMUEL RABINOVE
SOL RABKIN
JOSEPH B. ROBISON
Of Counsel

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IN THE

Supreme Court of the United States

October Term, 1967

No. 660

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACH, SAND LAKE AND NORTH GREENBUSH, RENSSELAER COUNTY AND CHATHAM, COLUMBIA COUNTY AND BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3, TOWNS OF NORTH HEMPSTEAD AND OYSTER BAY, NASSAU COUNTY, NEW YORK,

Appellants,

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JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York,

Appellee,

and

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH and BARBARA BRENNAN,

Intervenor-Appellees.

Appeal from the Court of Appeals of the State of New York

AMICUS CURIAE BRIEF

Interest of the *Amici*

This brief is submitted with the consent of counsel for the parties, in behalf of the following national Jewish organizations:

American Jewish Committee
American Jewish Congress

Anti-Defamation League of B'nai B'rith
Central Conference of American Rabbis
Jewish Labor Committee
Jewish War Veterans of the U.S.A.
National Council of Jewish Women
Union of American Hebrew Congregations
United Synagogue of America

Each of these organizations is concerned with preservation of the security and constitutional rights of Jews in America through preservation of the security and constitutional rights of all Americans. They are committed to the belief that separation of church and state is the surest guarantee of religious liberty and has proved of inestimable value both to religion and to the community generally. They submit this brief because they believe that the program provided for in the statute under review is a form of aid to religious institutions, bringing in its train the evils that the constitutional guarantee of separation of church and state was designed to prevent.

Statement of the Case

This is a suit by the boards of education of two school districts in New York challenging the constitutionality of a statute enacted by the state legislature in 1965 and amended in 1966 providing for state financing of the purchase of textbooks to be used without charge in private schools. The statute (Laws of 1965, ch. 320; Education Law, §701.3; 16 McKinney's Consol. Laws of New York) provides as follows:

> In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the

> power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees, or other school authorities. Such text-books are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities.

The purpose of the law is set forth in its first section, which reads as follows:

> * * * It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense, and the general welfare of the state. (Laws of 1965, ch. 320, §1.)

Although the statute speaks only of "private" schools, and does not specifically either include or exclude sectarian, parochial or other religiously affiliated or controlled schools, the New York Court of Appeals interpreted the statute (as did the lower courts) to include schools which, in the language of the state constitution (Article XI, Section 3), are "wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught."

On January 10, 1966, the State Department of Education, whose executive head is the appellee in this appeal,

acting pursuant to the statute, issued instructions to all school districts for the effectuation of the purposes and provisions of the statute. For the convenience of this Court, the text of these instructions is set forth as an appendix to this brief (*infra*, pp. 43-48).

The statute and the instructions imposed upon the various school boards of the state an affirmative duty which the appellants herein believed was violative of both the State and Federal constitutions. Accordingly, they brought suit in the Supreme Court of the State of New York, Albany County, and succeeded in obtaining a decision upholding their contentions (A. 29a-42a).* The Appellate Division of the Supreme Court reversed the decision (A. 43a-60a) and the Court of Appeals, by a vote of four to three, affirmed the judgment of the Appellate Division and upheld the constitutionality of the statute under both the State and Federal constitutions[1] (A. 61a-76a).

The Question to Which This Brief Is Addressed

This brief is addressed to the single question whether public financing of the purchase of secular textbooks for use in sectarian or parochial schools violates the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution. It expresses no opinion on the constitutionality of the law as applied to nonsectarian or secular private schools.

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* Numbers in parentheses preceded by the letter "A." refer to pages of the Appendix.

1. The opinion of the Supreme Court is reported at 51 Misc. 2d 297, 273 N.Y.S. 2d 239; that of the Appellate Division at 27 A.D. 2d 69, 276 N.Y.S. 2d 234; the Court of Appeals opinion is reported at 20 N.Y. 2d 109, 281 N.Y.S. 2d 799, 228 N.E. 2d 791.

Summary of Argument

This appeal presents a case of state financing of an aspect of parochial school education. Legislative designation of the provision of textbooks as "loans" to the children rather than "gifts" to the schools does not avoid the prohibitions of the First Amendment. It is a fiction to designate the provision as one for "loans" and, even if it were not, free loans of public property to churches is as unconstitutional as gifts of the property. Similarly, it is equally a fiction to characterize the children rather than the schools as the beneficiaries of the statutory program. The "child benefit" theory, which rests on that fiction, finds no support in the Constitution or the decisions of this Court. Acceptance of the concept to sustain the New York program providing textbooks for use in parochial schools could lead to constitutional justification of public financing of all costs of parochial and sectarian schooling with the possible exception of costs of direct teaching of religious dogma and practice. *Cochran* v. *Louisiana State Board of Education,* 281 U. S. 370 (1930) does not support the constitutionality of the New York law since it neither considered nor passed upon the applicability of the First Amendment to the textbook law there in issue.

The definitive interpretation of the Establishment Clause in *Everson* v. *Board of Education,* 330 U. S. 1 (1947) often repeated and applied by this Court in later cases, requires a determination that New York's textbook law seeks unconstitutionally to aid religion. Nothing in *Abington School District* v. *Schempp,* 374 U. S. 203 (1963) indicates any intention to retreat from or modify the definitive in-

terpretation set forth in *Everson* nor otherwise requires or even supports a determination other than that the law here in issue is unconstitutional as a law respecting an establishment of religion.

The textbook law is unconstitutional also under the free exercise clause of the First Amendment because it effects a compulsory tax for religious purposes. This conclusion is not altered by the fact that the funds used to purchase the books come from the general public treasury rather than a tax specifically designated or imposed for that purpose.

ARGUMENT

POINT I

The New York statute provides for State financing of parochial schools.

A. The Fiction of Loans

The New York statute uses the word "loan" rather than "give" or "donate", but the statute comes to this Court with the gloss of the New York Court of Appeals' opinion and the Education Department's letter of instruction. These, together with facts of common knowledge, indicate quite clearly that in the present case the claim that only a loan is involved is entirely fictional.

A loan of a book implies a short time use and a return. This type of transaction occurs thousands of times daily in public libraries all over the nation, where books are generally loaned for two or four weeks' use and are then re-

turned, so that they may be available for similar loans to other borrowers. This is quite clearly not what is contemplated by the New York statute, the Court of Appeals and the State Education Department.

A number of facts require this conclusion. In the first place, the statute is limited to textbooks. Such books are not intended for use for two or four weeks but for an entire school year. Paragraph 12 of the Education Department's letter of instruction (*infra*, p. 47) speaks of a yearly turnover of the books from one class to the next within each school. It is because of their long-term use that, as is commonly known, textbooks are generally not available in public libraries.[2]

In the second place, a loan necessarily implies return to the lender, but nothing in the statute or the letter of instruction requires return to the lender (the public school authorities) of the "loaned" textbooks. Indeed, the letter fairly contemplates that they will not be returned. We have seen that Paragraph 12 specifically negates the return of the books even at the end of the year. Paragraph 8 (*infra* pp. 45-6) states that "It is expected that public and private school authorities will make it possible to use requested textbooks over a period of years rather than requesting new textbooks on an annual basis." Any elementary school teacher or even parent of a school child knows that textbooks last for but a short "period of years" and then must be discarded either because they have become outdated or because they are physically no longer usable. The transac-

2. The fictional nature of the analogy to libraries is also revealed by the fact that the statute restricts the "loans" to secular books. Libraries are not so limited.

tion is reminiscent of the reply of Coriolanus to his friend Lartius whose horse he had just won in a friendly wager:

> No, I'll nor sell nor give him: lend you him I will
> For half a hundred years. (Act 1, Sc. 4)

In the third place, library loaning, at least, implies universality of availability. Any child, whether he attends a public or private school or no school at all may enter the public library and borrow a book. But the textbooks provided for by the statute are available only to specified groups, children enrolled in grades 7 to 12 of a school which complies with the compulsory education law.[3] Moreover, a child enrolled in the public schools cannot, either under the statute or the letter of instructions, enter a parochial school and borrow a book whose purchase was financed by public funds under the statute but is not one which is used in the public school he attends, although he could, of course, do so if the book were in a public library.

Finally, the statute and the letter of instruction clearly indicate an intent that the use of textbooks in the nonpublic schools shall be in a manner exactly the same as in the public schools. Until it was found necessary to find a constitutional justification for the free provision of publicly owned books in sectarian schools, no one suggested that school boards "loaned" books to the public schools in which they were used, any more than they "loaned" desks, chairs, blackboards and chalk. There would be little left of the

3. The Court of Appeals was therefore in error when it stated that "Subdivision 3 of section 701 of the Education Law asks no questions about what school the child attends, thus avoiding even the objection raised by Mr. Justice Jackson in his *Everson* dissent" (A. 67a, n. 2).

First Amendment's barrier to public financing of sectarian schools if it could be evaded simply by designating the permanent and exclusive free use of specific public property as a loan rather than as a gift.

It is true that the letter of instruction suggests that each book be stamped with the legend "This Book is the Property of the Blank C.S. District" (*infra*, p. 45). But is the First Amendment so frail that it can be overcome by a rubber stamp?

At most, the effect of the legend is to declare the state's legal reservation of title to the books. But legal title is not the constitutional criterion. In *Quick Bear* v. *Leupp*, 210 U. S. 50 (1908), the Court upheld the expenditure for sectarian school support of Indians' treaty funds because, while legal title was in the Federal Government, the Indian tribes had beneficial ownership. Conversely, here the transactions required by the New York law are unconstitutional because, while legal title may be in the State, beneficial ownership is in the sectarian schools.

B. The Irrelevance of the Loan Concept

Even if New York's claim of retained ownership is taken at face value, the constitutional barrier remains. The right to the use of property is itself property no less than its ownership. The New York constitutional provision (Article XI, Section 3) which the Court of Appeals, overruling a 30-year-old precedent (*Judd* v. *Board of Education*, 278 N.Y. 200 (1938)), held not violated by the textbook law, speaks exclusively in terms of use rather than

transfer of title or conveyance.[4] President Madison vetoed a bill to convey government-owned property to the Baptist Church because it violated the amendment which he had drafted, saying:

> because the bill in reserving a certain parcel of land of the United States for the use of said Baptist Church comprises a principle and a precedent for the appropriation of funds of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that "Congress shall make no law respecting a religious establishment."[5]

In *McCollum* v. *Board of Education*, 333 U. S. 203 (1948), this Court held unconstitutional a program of released time for religious education which involved the use of public school premises for religious instruction. It made no difference that no transfer of title was involved

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4. Article XI, Section 3 reads as follows: "Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning." It is relevant to note that the last clause, permitting transportation, was added to abrogate the holding in *Judd* that transportation to parochial schools at public expense violated the constitutional provision. Although the Appellate Division, in a decision (*Smith* v. *Donahue*, 202 App. Div. 656 (1922)) quoted with approval in *Judd* had held that a law similar to the one here in issue likewise violated the state constitutional provision, the constitutional amendment was limited to transportation, an implicit acknowledgment that public purchase of books used in sectarian schools violates that principle of church-state separation which is the common basis of Article XI, Section 3 of the New York Constitution and the First Amendment of the United States Constitution.

5. 1 Richardson, *Messages and Papers of the Presidents* 490 (1900).

and the "loan" of the public school premises was temporary and for short periods—but one hour weekly.

As we will indicate later (*infra*, pp. 22-25), *Cochran* v. *Louisiana State Board of Education, supra*, is not determinative of the central issue in this case. One aspect of it is, however, pertinent and persuasive here, and that is this Court's recognition that there is no constitutional difference between grant of title and grant of use. There, in upholding a textbook-loan law, the Court said (281 U. S. at 375):

> The [Louisiana] Court also stated, *although the point is not of importance in relation to the Federal question,* that it was "only the use of the books that is granted to the children, or, in other words, the books are lent to them." (Emphasis supplied.)

Judge Van Voorhis, in his dissenting opinion in the court below, pointed out the insubstantiality of any constitutional distinction predicated on the claim that the books were not given but loaned (A. 73a):

> If the books to be purchased by Boards of Education and supplied to pupils of parochial schools were religious tracts, it is conceded that the statute would be unconstitutional. The mere circumstance that they would be loaned to the pupil rather than supplied directly to the school would not preserve its validity.

C. The Fiction That the Loans Are to Children

The majority of the New York Court of Appeals upheld the constitutionality of the textbook law on the ground that books are "loaned" not to the schools but to the children, that "there is no intention to assist parochial schools as such, [and that] any benefit accruing to those schools is a

collateral effect of the statute. * * *" (A. 66a). The Court thus invoked and relied upon what has become known as the "child benefit" or "indirect aid" theory.[6] We submit that this is an unrealistic description of the purpose and effect of the statute for the following reasons:

1. The declared purpose of the statute is not to aid children but to "give assistance to educational programs" (L. 1965, ch. 320 §1). The majority opinion in the court below speaks of "Federal and State aid to education" (A. 66a). It is quite clear that the majority viewed the statute as an instance of governmental aid to education. All other instances of governmental "assistance to educational programs"[7] or "aid to education" are characterized by governmental financing of the institution conducting the education programs or providing the education. Nothing in the statute or in the Court of Appeals decision indicates that the purpose and effect of this statute were to be different—except for such ritualistic obeisance to "child benefit" which might possibly serve to protect it from invalidation under the First Amendment.

2. The 1965 statute did not introduce a new program regarding textbooks into the New York educational system.

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6. The majority used the word "collateral" rather than "indirect" and indeed denied that any indirect benefit accrued to the parochial schools. The court probably so held because the New York constitution (Article XI, Section 3) forbids indirect benefits no less than direct ones. However, insofar as the First Amendment to the Federal Constitution is concerned, the assumption, which as we show below (pp. 16-22) is erroneous, is often made that indirect benefits to parochial schools are constitutionally permissible.

7. Contracts with educational institutions to perform a specific research project may be an exception, but they are obviously not contemplated by the statute here in issue.

For years public educatio al authorities have been supplying textbooks for use in public schools. They have done so under Section 703 of the Education Law, subdivision 1 whereof read, prior to 1965, as follows:

> 1. The qualified voters of any school district present at any annual school meeting or at any special school meeting duly and legally called for that purpose, shall have power, by a majority vote, to be ascertained by taking and recording the ayes and noes, to vote a tax for the purchase of all textbooks used, or to be used, in the schools of the district.

What the 1965 law did was simply to make mandatory (in grades 7 through 12) what, although theoretically merely permissive, had been in actual practice universal—the supplying of textbooks at public expense for use in public schools—and to extend it to private schools. Whatever may have been the practice in the early days of public education, it is the universal practice today that children in public schools are given the use of textbooks in the same way they receive the use of chairs, desks, blackboards, chalk, paper and all the other physical accoutrements of schooling. Provision of these facilities for public schools has never been considered an "aid to children" as distinguished from a financing of the operations of the school. Realistically, today, neither are textbooks. Should this Court hold that state financing of the purchase of textbooks for use in sectarian schools is a constitutionally permissible aid to the children and not a forbidden form of assistance to the schools, how could this be distinguished constitutionally from state financing of the purchase of chairs, desks, blackboards, and, indeed, entire buildings and all other facilities not directly related to religious instruction or practices? What then would remain of the First Amendment?

Irrespective of past practices, the statute here in issue encompasses public and parochial schools in a single program of textbook financing as far as the future is concerned. It expressly equates public and parochial schools in respect to textbook financing. Realistically what New York is saying is that it has been and will continue financing all aspects of public school education, and now it will also finance at least that portion of parochial school education arising out of the need for textbooks.

3. Eligibility for participation in the textbook program is dependent not upon the child but upon the school. Unlike the public library pattern, only those children are entitled to the benefits of the law who are enrolled in "a public or private school which complies with the compulsory education law." But if the child is the intended beneficiary of the law, why should he be penalized because the school he attends does not meet the standards of the education law? The point was well stated by the Circuit Court in the Oregon case of *Dickman* v. *School District*, 232 Ore. 238, 366 P. 2d 533 (1961):[8]

> * * * If the books are furnished to the children alone and not the school, why then does the school have to meet certain governmental standards before the children who attend them are entitled to free books? Is not a child attending a poorly operated school in need of free books as much, if not more so, than one attending a school that is well run? Are the children of poor sects in any less need of free textbooks because their church cannot afford concrete fireproof buildings? The

8. The Circuit Court was of the opinion that Oregon's parochial school textbook law was unconstitutional but believed itself bound by this Court's decisions in *Cochran* and *Everson*. The Oregon Supreme Court held that these decisions did not require such a holding and adjudged the law to be unconstitutional, substantially for the reasons stated by the Circuit Court.

standards of the schools, not the needs of the children, determine their eligibility. (Abstract of Record, 23-24).

4. The school is inextricably involved in the administration of the law, so much so that the law cannot operate without the full and active participation of the school (unlike public libraries which are completely independent of schools). This can be seen from the following:

(a) Eligibility for books is dependent upon enrollment in specified grades in the school. (Statute)

(b) The school must be one which complies with the compulsory education law. (Statute)

(c) Only textbooks are available. (Statute)

(d) The books must be those approved for use in public schools. (Statute)

(e) The regulations for distribution of the books must be prescribed by "school authorities" (not public library authorities). (Statute)

(f) Students attending schools outside the state are not eligible. (Letter of Instruction, par. 2)

(g) While technically the "requests to the board for the loan of textbooks must come from the individual child, * * * children may make their requests known to an official in a private school and such private school official may then provide the board with a joint request from a number of such children." (Letter of Instruction, par. 5.) It may safely be presumed that the latter is the usual if not universal practice. (In public libraries, the library deals exclusively with the borrowing child.)

(h) The "board need only provide such textbooks as are needed in the school" (Letter of Instruction, par. 8).

(i) "It is assumed that the public school, working in conjunction with the private schools, can decide on those books which are generally accepted as textbooks" (Letter of Instruction, par. 9).

(j) The books are received by the children from the private school at the beginning of the year and returned to the private school at the end of the year. This is clearly inferrable from Paragraph 12 of the letter of instruction, which provides that the books need not be returned to the public school at the end of the year. Hence, the only way a book can be available for use by another child in the second year is by having the first child return it to the private school from which the second child can receive it the following year. It can scarcely be assumed that each seventh grade child can be expected personally to turn over the books to his successor in interest.

D. The "Child Benefit" Theory

Even if full faith and credit is accorded to the legislative assertion that the purpose and effect of the textbook law is to loan books to children attending private and parochial schools rather than to aid the schools they attend, the law, we submit, would still be violative of the First Amendment. The reliance of the New York Court of Appeals on the "child benefit" or "indirect aid" theory was, we suggest, erroneous. The "child benefit" theory has no support in the Constitution or in the decisions of this Court. The test

this Court has applied is not whether the aid provided through sectarian schools is intended for the child but whether it is educational or noneducational.[9]

The "child benefit" theory appears to have been first advanced in 1922 by counsel in the textbook case of *Smith* v. *Donahue, supra.* It was there rejected in language which is as valid today as it was then (202 App. Div. at 661):

> Even though we accept the statute as meaning that the books and supplies are to be furnished to the pupils and not to the schools, we think the act plainly comes within the prohibition of the Constitution; if not directly in aid of the parochial schools, it certainly is in indirect aid. The scholars do not use textbooks and ordinary school supplies apart from their studies in the school. They want them for the sole purpose of their work there. There is no question but that the textbooks and ordinary school supplies are furnished direct to the public schools; there is no thought that they are furnished to the scholars as distinct from the schools. Neither can there be such a thought in the case of parochial schools.

Later in the opinion the court said (*id.* at 663-664):

> * * * [T]he school is not the building and its equipment; it is the organization, the union of all the elements in the organization, to furnish education in some branch of learning * * * * It is the institution, and the teachers and scholars together, that make it up. The pupils are part of the schools.
>
> * * *
>
> It seems to us to be giving a strained and unusual meaning to words if we hold that the books and the ordinary school supplies, when furnished for the use

9. It is, of course, not here contended that the State may not constitutionally provide for the welfare of children. Indeed, it has a duty to protect their health and welfare.

> of pupils, is a furnishing to the pupils and not a furnishing in aid or maintenance of a school of learning. It seems very plain that such furnishing is at least indirectly in aid of the institution and that, if not in actual violation of the words, it is in violation of the true intent and meaning of the Constitution and in consequence equally unconstitutional.

In *Gurney* v. *Ferguson,* 190 Okla. 254, 122 P. 2d 1002 (1941), a school bus case, the court similarly refused to accept the "child benefit" theory. The court said (190 Okla. at 255):

> It is urged that the present legislative act does not result in the use of public funds for the benefit or support of this sectarian institution or school as such; that such benefit as flows from these acts accrues to the benefit of the individual child or to a group of children as distinguished from the school as an organization. That argument is not impressive. A similar argument was said to be "utterly without substance" in *Judd* v. *Board of Education,* 278 N.Y. 200, 15 N.E. 2d 576. It is true this use of public money and property aids the child, but it is no less true that practically every proper expenditure for school purposes aids the child * * * The state has no authority to maintain a sectarian school. Surely the expenditure of public funds for the erection of school buildings, the purchasing and equipping and upkeep of same; the payment of teachers, and for other proper related purposes is expenditure made for schools as such. Yet the same argument is equally applicable to those expenditures as to the present one.
>
> If the cost of the school bus and the maintenance and operation thereof was not in aid of the public schools, then expenditures therefor out of the school funds would be unauthorized and illegal * * * If the maintenance and operation of the bus and transportation of pupils is in aid of the public schools then it

would seem necessary to follow that when pupils of parochial schools are transported such service would likewise be in aid of that school.

The expenditure of the public funds for the purposes here shown is confined to children attending school, thus refuting any argument that such transportation is for the benefit of children generally and not for schools or that such transportation is furnished in regulating traffic within the police power, or primarily in promoting the health and safety of the children of the state.

The "child benefit" theory was first adopted by a court in *Borden* v. *Louisiana State Board of Education,* 168 La. 1005, 123 So. 655 (1929), a textbook case, and since then has, with only one exception,[10] been rejected by the courts to which it has been presented.[11] Although this Court in

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10. *Chance* v. *Mississippi State Textbook Board,* 190 Miss. 453, 200 So. 706 (1941).

11. *Textbooks*: *Zellers* v. *Huff,* 55 N.M. 501, 236 P.2d 949 (1951); *Dickman* v. *School District,* 232 Ore. 238, 366 P. 2d 533, cert. den., 371 U. S. 823 (1962); *Haas* v. *Independent School District,* 69 S.D. 303, 9 N.W. 2d 707 (1943).

Bus Transportation: *Matthews* v. *Quinton,* 362 P. 2d 932 (Alaska, 1961); *State ex rel. Traub* v. *Brown,* 36 Del. 181. 172 A. 835 (1934); *Opinion of the Justices,* 216 A. 2d 698 (Del., 1962); *Silver Lake Consolidated School District* v. *Parker,* 238 Iowa 984, 29 N.W. 2d 214 (1947); *McVey* v. *Hawkins,* 258 S.W. 2d 927 (Mo., 1953); *Judd* v. *Board of Education, supra*; *Gurney* v. *Ferguson, supra*; *Board of Education* v. *Antone,* 384 P. 2d 911 (Okla., 1963); *Mitchell* v. *Consolidated School District,* 17 Wash. 2d 61, 135 P. 2d 79 (1943); *Visser* v. *Nooksack Valley School District,* 33 Wash. 2d 699, 207 P. 2d 198 (1949); *State ex rel. Van Straten* v. *Milquet,* 180 Wisc. 109 292 N.W. 392 (1923); *Reynolds* v. *Nussbaum,* 17 Wisc. 2d 148, 115 N.W. 2d 761 (1962).

Direct Subsidy: *Opinion of the Justices,* —— N.H. ——, decided October 6, 1967.

Tuition Payments: *Almond* v. *Day,* 197 Va. 419 (1955); *Swart* v. *South Burlington School Dist.,* 122 Vt. 177, cert. den. 366 U. S. 925 (1961).

Construction of College Buildings: *Horace Mann League* v. *Board of Public Works,* 242 Md. 645, 220 A. 2d 51, cert. den. and appeal dismissed, 385 U. S. 97 (1966).

Cochran accepted the Louisiana court's interpretation of its statute, it did not in *Everson* v. *Board of Education,* 330 U. S. 1 (1947), adopt the "child benefit" theory. Publicly-financed transportation was not there sustained in reliance on the *Cochran* decision. Had the Court wished to adopt the "child benefit" theory, it could have relied on *Cochran,* but that decision was not even cited in the church-state part of the opinion and only tangentially in the taxation-for-private-purpose part (330 U. S. at 7).

It was not the fact that the benefit to parochial schools was indirect that preserved the constitutionality of the statute in *Everson;* it was that the service supplied was of a welfare rather than an educational character. The purpose of the statute, according to the Court's opinion, was not to further education but to protect children from the hazards of traffic. In this case, children were the object of the welfare service in the same way that they are the recipients of medical and dental services or hot lunches. The distinction made in *Everson* was analyzed in a note appearing in the Winter 1966 issue of the Indiana Law Journal (41 Indiana Law Journal 302, 309-10):

> The nature of the benefit must be the point of focus instead of the beneficiaries. Benefits coming within the category of educational costs are unconstitutional. But *Everson* would sustain the public giving of what has been referred to as "true welfare" benefits such as vaccinations, medical treatment, dental care, school lunches, and health programs. The kind of benefit is determinative, and attendance at a given school is constitutionally insignificant * * *

We will return to *Cochran* to show further why it is not a precedent applicable in this case; here we note only that

those state courts which have upheld transportation statutes have done so on the welfare service rather than "child benefit" premise.[12]

It is true that the statute, as construed by the Court of Appeals, authorizes only nonreligious or secular textbooks for use in parochial schools, but we submit that the secularity of the textbooks is irrelevant if the aid is educational. The test is not the nature of the aid or benefit, but whether in fact an educational aid or benefit of any kind has been conferred. Textbooks are not the only "secular" articles used in parochial schools. There is nothing particularly sectarian about chairs, desks, notebooks, chalk, board erasers, pencils, pens, electrical fixtures, heating equipment and a hundred other objects without which a school, public or parochial, cannot operate. Can it be urged that under the First Amendment public authorities could validly purchase these objects and divide them among public and religious schools? Can it be urged that if they did so they would not be providing "aid" or "benefit" to the parochial schools?

The crux of the matter is that if the "child benefit" theory is accepted in this case, it can lead only to constitutional justification of public financing of all costs of sectarian schooling other than the cost of missals and prayer books and compensation for that portion of the teachers' time as is devoted to religious indoctrination or ritual. It is significant that, in the first case in which the "child benefit" theory was presented to a court, *Smith* v. *Donahue*,

12. See, e.g., *Rhoades* v. *School District*, 424 Pa. 202, 226 A. 2d 53 (1967).

supra, the challenged statute was not limited to textbooks but included other school supplies. The court, seeing no difference between financing of textbook purchases and of other school supplies, rejected the "child benefit" theory in respect to both. We suggest that if this Court does otherwise, the result will be virtually full financing of religious school operations out of tax-raised funds.

POINT II

Cochran v. *Louisiana State Board of Education* is no precedent for the constitutionality of the New York textbook law.

In *Cochran*, this Court upheld the constitutionality of a Louisiana law similar to the one here in issue. The only ground on which the law was challenged and on which the Court passed was whether Louisiana was using public funds for a private purpose, thus constituting a deprivation of property without due process of law, as held in *Loan Association* v. *Topeka*, 20 Wall. 655 (1875). No claim was made that the law constituted a violation of either the establishment or free exercise provisions of the First Amendment. It was not until four years later, in *Hamilton* v. *Regents of the University of California*, that it was first suggested that these clauses may be applicable to the states.[13]

In the absence of any controlling prohibition of governmental aid to religion, it was by no means unreasonable to hold that a grant of public funds to a private school did not

13. "* * * The First Amendment, if read into the Fourteenth, makes invalid any state law 'respecting an establishment of religion, or prohibiting the free exercise thereof.'" 293 U. S. 245, 266 (1934) (concurring opinion of Mr. Justice Cardozo).

constitute an expenditure for a nonpublic purpose. Ever since Hamilton's Report on Manufactures, America has taken a broad view of what constitutes a public purpose within government's spending powers. This tradition and its inapplicability to expenditures within the purview of the Establishment Clause was well stated by Mr. Justice Jackson in his dissent in *Everson* (330 U.S. at 26):

> * * * I agree that this Court has left, and always should leave to each state, great latitude in deciding for itself, in the light of its own conditions, what shall be public purposes in its scheme of things. It may socialize utilities and economic enterprises and make taxpayers' business of what conventionally had been private business. It may make public business of individual welfare, health, education, entertainment and security. *But it cannot make public business of religious worship or instruction, or of attendance at religious institutions of any character.* (Emphasis supplied.)

In his concurring opinion in *Abington School District v. Schempp,* 374 U.S. 203, 248 (1963), Mr. Justice Brennan noted the inapplicability of *Cochran* to a challenge under the First Amendment:

> A third case in this group is Cochran v. Louisiana State Board, 281 U.S. 370, which involved a challenge to a state statute providing public funds to support a loan of free textbooks to pupils in both public and private schools. The constitutional issues in this Court extended no further than the claim that this program amounted to a taking of private property for nonpublic use. The Court rejected the claim on the ground that no private use of property was involved; "* * * we cannot doubt that the taxing power of the State is exerted for a public purpose." 281 U.S. at 375. The

case therefore raised no issue under the First Amendment.

We think it significant that in the present case the New York Court of Appeals did not cite the *Cochran* case in support of its holding that the textbook law does not violate the First Amendment. Implicitly this omission, we suggest, supports our assertion that *Cochran* constitutes neither binding nor persuasive precedent in the determination of the issues presented in this case.

Basically, the difference between *Cochran* and the present case is the difference between general or welfare legislation and legislation affecting First Amendment rights. In the case of legislation regulating rights secured by the First Amendment, the usual presumption of the constitutionality of legislation is balanced by "the preferred place given in our scheme to the great freedoms secured by the First Amendment." *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945); *Marsh* v. *Alabama*, 326 U.S. 501, 509 (1946); *Prince* v. *Massachusetts*, 321 U.S. 158, 164 (1944). Ordinarily, if a situation exists requiring legislative action, it is for the legislature and not the courts to determine the appropriateness of a proposed remedy, and the courts may not interfere unless the legislature's act was patently unreasonable. But for legislation abridging a liberty secured by the First Amendment, a more rigorous test is imposed. "The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice." *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945). "Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an

inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions." *Thornhill* v. *Alabama*, 310 U.S. 88, 95-96 (1940).

It is therefore by the standards applicable to challenges under the First Amendment that this case, unlike *Cochran*, must be judged by the Court.

POINT III

The decisions of this Court consistently forbid governmental aid to sectarian schools in the form of textbooks or otherwise.

In their briefs in the Court of Appeals, both sets of appellees[14] rely heavily on the following extract from *Schempp* (374 U.S. at 222):

> The test may be stated as follows: What are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

Applying this test, the appellees asserted that since the textbooks furnished by the state for use in parochial schools are secular and will not be used for religious instruction, neither the primary purpose nor the effect of the state expenditures is to advance religion.

14. Defendant's brief, pp. 33-34; Intervenors' brief, p. 42.

We submit that this is erroneous on two counts. First, it misconceives the test as established by a consistent line of this Court's decisions which were in no way weakened or superseded by *Schempp*, and secondly, even if *Schempp* were exclusively applicable, it would not support the statute here challenged.

A. The Decisions Prior to *Schempp*

This Court has on numerous occasions considered the constitutionality of the grant of tax-raised funds or of the use of publicly-owned facilities to sectarian schools and on each occasion, without exception, it stated either expressly or impliedly that such a grant would be unconstitutional.

As we have seen, in *Quick Bear* v. *Leupp*, *supra*, the Court held that treaty and other funds held for their Indian owners by the Federal Government as trustee could constitutionally be disbursed to pay the cost of tuition for the Indians at private, religious schools which they desired to attend. The Court upheld the expenditures because the funds belonged to the Indians and not to the government; the Indians had the right to use their own money to educate their children in the schools of their own choice, even though the government could not disburse its own money to the same schools because of the First Amendment prohibition of an establishment of religion.

In *Everson* v. *Board of Education*, *supra*, this Court unanimously held that the First Amendment's ban on laws respecting an establishment of religion is applicable to the states by reason of the Fourteenth Amendment. Nevertheless, it ruled by a vote of five to four that a state (New

Jersey) could constitutionally finance bus transportation of children to parochial as well as public schools. The Court found the program to be a public safety measure to protect all children from traffic hazards and the dangers of the road. It said (330 U.S. at 16):

> We must consider the New Jersey statute in accordance with the * * * limitations imposed by the First Amendment. But we must not strike that state statute down if it is within the state's constitutional power even though it approaches the verge of that power. (Citations omitted.) *New Jersey cannot consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church.* On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of *public welfare legislation.* * * * (Emphasis supplied.)

The Court then set forth the following paragraph which has become the most authoritative, frequently reiterated and almost classic exposition of the meaning of the Establishment Clause (330 U.S. at 15-16):

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or dis-

belief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. *No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.* Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State." (Emphasis supplied.)

In *McCollum* v. *Board of Education, supra,* the Court held it unconstitutional to allow the use of public school premises for sectarian teachings. The Court repeated that (333 U. S. at 210): "*No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.*" (Emphasis supplied.)

In *Zorach* v. *Clauson,* 343 U. S. 306 (1952), the Court upheld the constitutionality of a program of released time for religious education under which children would be released from public school for one hour a week to receive religious instruction in church schools, *because no expenditure of public funds or use of public buildings was involved.* The Court said (at 314): "*Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education.* * * *" (Emphasis supplied.)

In *Engel* v. *Vitale*, 370 U. S. 421 (1962), the Court, in holding unconstitutional the practice of prayer recitation in the public schools, which had been prevalent almost since the founding of the public schools, stated (at 431) that when "the power, prestige *and financial support* of government is placed behind a particular religious belief," the Establishment Clause of the First Amendment is violated. (Emphasis supplied.) The court quoted from Madison's Memorial and Remonstrance (at 436), that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."

One decision remains to be discussed. In *Bradfield* v. *Roberts*, 175 U. S. 291 (1899), the Court upheld a payment of Federal funds to construct a hospital operated by a corporation formed by members of a religious order. The service performed was in the field of welfare (i.e., health) rather than education.[15] The same distinction was made in the *Everson* case, where the Court upheld the grant on the ground that its purpose was to protect the physical safety of children who traveled public streets in heavy traffic.

B. The Effect of *Schempp*

This was the state of the law before *Schempp*. It is impossible, for the following reasons, to conclude that this Court in *Schempp* intended to discard all this law and re-

15. The case is also distinguishable in that the Court pointed out that there was no evidence that the hospital was run in a sectarian manner or subject to ecclesiastical authority, and the payments covered contract payments for poor persons for whom the government was responsible, and whose care it was in effect purchasing.

place it by a weaker interpretation of the First Amendment:

1. Every member of the Court from *Everson* through *Schempp* without exception had on at least one occasion concurred in the principles set forth in the definitive interpretation of the Establishment Clause in *Everson,* quoted above.

2. The cited extract from *Schempp* was stated in a decision which went further than any previous one (with the possible exception of *Engel* v. *Vitale*) in giving a broad interpretation to the Amendment.

3. The *Schempp* opinion was written by Mr. Justice Clark who had concurred in the opinions in *McGowan* v. *Maryland,* 366 U. S. 420 (1961) and *Torcaso* v. *Watkins,* 367 U. S. 488 (1961), in both of which the classic interpretative paragraph from *Everson,* set forth above, was repeated in *haec verba* (366 U. S. at 443; 367 U. S. at 492-3).

4. It was concurred in by Mr. Justice Black, the author of that paragraph.

5. It was concurred in by the Chief Justice, the author of the *McGowan* opinion.

6. It was concurred in by Mr. Justice Douglas who, in *Engel,* expressed an interpretation of the Establishment Clause which is generally considered more strict than any expressed by any other member of the Court (370 U. S. at 437).

7. Quotations from other opinions in the *Schempp* decision indicate a clear intent to strengthen, not to weaken, the

Establishment Clause. Typical is the quotation in the Court's opinion (347 U. S. at 216) of the following extract from Mr. Justice Jackson's dissent in the *Everson* case:

> There is no answer to the proposition * * * that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could *directly or indirectly* be made public business and thereby be supported in whole or in part at taxpayers' expense. * * * This freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity. (Emphasis supplied.)

In conclusion on this aspect of our brief, the following from the opinion of Chief Justice Marshall in *United States* v. *Aaron Burr*, 4 Cranch 470, 482 (1807) is particularly relevant:

> * * * an opinion which is to overrule all former precedents and to establish a principle never before recognized, should be expressed in plain and explicit terms. A mere implication ought not to prostrate a principle which seems to have been so well established.
>
> * * *
>
> General expressions ought not to be considered as overruling settled principles without a direct declaration to that effect. * * *

It is particularly ironic that a paragraph from Mr. Justice Clark's opinion in *Schempp* should be invoked to support a claim that the interpretation of the Establishment Clause first expressed in *Everson* has been modified or watered down. As he pointed out in the opinion (374 U. S. at 216), for almost twenty years after *Everson*, efforts were made to persuade the Court to change its ruling and to hold

that the Clause forbids only governmental preference of one religion over another. This interpretation would of course greatly weaken the force of the Establishment Clause if not vitiate it entirely. "Such contentions," Mr. Justice Clark said, "in the light of the consistent interpretation in cases of this Court, seem entirely untenable and of value only as academic exercises" (*Ibid.*, p. 217). It is hard to believe that he would go out of his way to make sure that one artery from the heart of *Everson* should be sealed off to prevent the escape of its lifeblood while at the same time opening another and equally vital artery.

What, then, was the purpose of the extract from the *Schempp* opinion quoted in the trial court's decision? Here, again, the words of Chief Justice Marshall in *Burr* are particularly apposite:

> Every opinion to be correctly understood ought to be considered with a view to the case in which it was delivered. (4 Cranch at 482)

The classic paragraph and other expressions against use of tax-raised funds for sectarian educational practices or institutions were first stated in the *Everson* case, which specifically involved, or was alleged to involve, such use. They were repeated in the *McCollum* case, which involved such use in the form of the use of public school premises and of the machinery of the public school participating in the released time program. In *Engel,* this Court, with the excepton of Justice Douglas, did not consider the issue to be one of expenditure of public funds, and therefore the paragraph from *Everson-McCollum* may not have been specifically appropriate.

Nor was any expenditure involved in *Schempp*. The Court accordingly thought it fitting to state a test which would encompass governmental involvement in religion which did not involve expenditure of public funds. That test was supplemental to, not a substitute for, the oft-expressed principle first stated in *Everson* that "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."

C. The Application of *Schempp*

We submit that, even if the so-called *Schempp* test were to be applied without considering anything that came before it from *Bradfield* v. *Roberts* through *Engel,* and even *Schempp* itself other than the "test," the New York textbook law would still be invalid. Under the test, a law violates the Establishment Clause if either the purpose of the primary effect is the advancement of religion. Both of these conditions apply to New York's textbook law.

We note initially that purpose and effect are inextricably bound together. It is an ancient rule of law that one is presumed to have intended the natural and foreseeable consequences of his acts. This principle was applied to the Establishment Clause in the concluding words of this Court's opinion in *McGowan* v. *Maryland, supra,* 366 U. S. at 453:

> * * * We do not hold that Sunday legislation may not be a violation of the "Establishment" Clause if it can be demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction

with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion.

If, as we believe we have established, public financing of the purchase of textbooks for use in parochial schools is in fact *pro tanto* a financing of their operation, and if, as was so clearly shown by Mr. Justice Jackson in his dissenting opinion in *Everson* (330 U. S. at 22-24), parochial schools are an important instrumentality of the religion taught therein, it follows that aid to the schools through the textbook law is aid to the religion. If it were not so perceived, it would be difficult to comprehend the earnest advocacy of this practice by a number of religious groups.

The Catholic parochial school system is predicated on the sections of the Canon Law quoted by Mr. Justice Jackson in *Everson*. The encyclical of Pope Pius XI *On the Christian Education of Youth* states that the "only school approved by the Church is one where * * * the Catholic religion permeates the entire atmosphere [and where] all teaching and the whole organization of the school and its teachers, syllabus and textbooks in every branch [is] by the Christian spirit." [16]

These words of Pius XI epitomize the whole Catholic philosophy of education and the educational foundation of the Catholic parochial school system. Catholic doctrine does not conceive of religion as a subject which, like history or music, can be taught more or less independently of other subjects a specified number of school hours weekly; in the Catholic school, religion is not merely

16. Redden and Ryan, *A Catholic Philosophy of Education*, 107, 118 (1942).

a branch in the curriculum, nor is it confined to mere instruction. The ultimate goal of education is the praise, reverence and service of God; and everything else in education must be subordinated and directed toward this ultimate end.[17] This leaves no place for purely secular instruction in the Catholic school; indeed, the term "secular education" is almost self-contradictory in such schools. Everything taught in the Catholic school is taught with the ultimate goal of religious education in mind—everything must be impregnated with God and religion. As stated by the Reverend Joseph H. Fichter, S. J., in an authoritative book published in 1958:

> It is a commonplace observation that in the parochial school religion permeates the whole curriculum and is not confined to a single half hour period of the day. Even arithmetic can be used as an instrument of pious thought, as in the case of the teacher who gave this problem to her class: "If it takes forty thousand priests and a hundred forty thousand sisters to care for forty million Catholics in the United States, how many more priests and sisters will be needed to convert and care for the hundred million non-Catholics in the United States?"[18]

This conclusion was reached by the Supreme Court of Oregon in *Dickman* v. *School District*, *supra*, where the Court said (232 Ore. at 243):

> The evidence establishes, and the trial judge found, that the purposes of the Catholic church in operating St. John's school and other similar schools under its supervision is to permeate the entire educational process with the precepts of the Catholic religion. The

17. *Id.* at 29.

18. Fichter, *Parochial Schools: A Sociological Study*, 86 (1958).

> study guides used by the teachers in St. John's school indicate that, to some extent at least, the use of the textbooks furnished by the district is inextricably connected with the teaching of religious concepts. These study guides were prepared by the superintendent of schools of the Archdiocese of Portland. There is no doubt that the teaching of the subject matter in this manner in a public school would be contrary to law.

The difficulty if not impossibility of separating the sacred from the secular in parochial school teaching was stressed in the dissenting opinion of Judge Van Voorhis in the court below (A. 73a-74a). The same point was made by the Supreme Court of Vermont in *Swart* v. *South Burlington Town School District*, 122 Vt. 177, 187-8, 167 A. 2d 514, 520 (1961):

> In this instance the defendant school board has elected to discharge its duty by furnishing secondary education outside the public facilities of the district. For a substantial number of its advanced students at least, the legal and public duty of the district is undertaken in religious denominational high schools that are an integral part of the Roman Catholic Church. The Church is the source of their control and the principal source of their support.
>
> This combination of factors renders the service of the Church and its ministry inseparate from its educational function. That this is a high and dedicated undertaking is not to be questioned, and deserves the respect of all creeds. Yet however worthy the object, the First Amendment commands the State shall not participate.

What is true of the Catholic parochial school is equally true of many Protestant and Jewish day schools. They

pursue the same mission and perform the same function for their faith as the parochial schools do for Catholicism.

Thus, a noted Protestant theologian said of the Protestant schools:

> Policywise, these schools fall into three general groups. The first maintains schools because it feels that the necessity for doing so is implied in its theological point of view. The second appears to maintain its schools because of the close relationship between its doctrine, its religious practices, and the total culture in which it feels its children and youth must be nurtured. The third group maintains its schools because of the conviction that an education that is not permeated with religious values of a specific Christian sort tends to promote secularism and gives the pupil the idea that religion is a thing apart from the rest of his major concerns.[19]

With respect to Jewish day schools, see Symposium, *The Jewish Day School in America: Its Theory and Practice*, 20 Jewish Education, No. 1 (1948); Kaminetsky, *The Hebrew Day School Movement*, 82 School and Society 105 (1955). As one noted authority describes the process:

> Integration is incorporated into the subject matter as well. In the expressional arts general and Jewish arts are combined and taught as one. Jewish history will encompass the history of the many people with whom the Jews came into contact. General geography will include the geography of Israel. The important events studied in the Bible, such as the Exodus from Egypt and the Revelation at Sinai, are associated with

19. Wyckoff, *The Protestant Day School*, 82 School and Society 98, 99 (1955). See also Rian, *Christianity and American Education* (1949).

> the emancipation of other peoples, and especially with the independence won by America, as well as with the doctrines of liberty and democracy that are universal in character and biblical in origin. In the domestic science laboratory nutrition and homemaking are taught along with the laws of Kashruth and Dietary observances. [20]

The sum of the matter is that Catholic parochial schools, many Protestant and Jewish day schools and similar sectarian schools of other faiths exist for one purpose and one purpose only, to preserve and advance the respective religions which created and maintain them. A law financing any part of their operations has and can only have for its purpose and primary effect governmental assistance of the religious purpose. This, we submit, the Establishment Clause of the First Amendment forbids, even under the limited interpretation advocated by the appellees and accepted by the court below.

POINT IV

The New York textbook law violates the Free Exercise Clause of the First Amendment.

We believe we have shown that the New York textbook law constitutes a form of aid to religious institutions that violates the Establishment Clause of the First Amendment. We here argue further that the law constitutes a tax for a religious purpose and that this compulsory taxation for

20. Goodside, *Religious and Secular Studies in the Day School,* 24 Jewish Education 55, 56 (1953). See also, Goodside, *Integration of Jewish and General Social Studies in the Day School,* 23 Jewish Education No. 2 (1951).

religion violates the Free Exercise Clause no less than the Establishment Clause.

Fundamental to the concept of religious freedom, as envisaged by the Framers of the First Amendment, was the belief that it was destructive of personal freedom to compel any man to pay taxes for religious purposes. Indeed, the history of the struggle for religious freedom in America is in large measure the history of the struggle against taxation for religious purposes. As early as 1644, a tanner named Briscoe in Massachusetts Bay Colony published a pamphlet against the church tax, arguing that such a method of supporting religion was immoral and contrary to justice.[21] As this Court said in *Everson* (330 U.S. at 11):

> These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment. No one locality and no one group throughout the Colonies can rightly be given entire credit for having aroused the sentiment that culminated in adoption of the Bill of Rights' provisions embracing religious liberty. But Virginia, where the established church had achieved a dominant influence in political affairs and where many excesses attracted wide public attention, provided a great stimulus and able leadership for the movement. The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist

21. Cobb, *The Rise of Religious Liberty in America*, p. 170 (1902).

any or all religions, or to interfere with the beliefs of any religious individual or group.

The Court then referred to the struggle against the tax levy for religion in Virginia, Madison's *Memorial and Remonstrance* which led to its success, and Jefferson's Statute for Establishing Religious Liberty which was a product of that success. It is significant that much of the *Memorial and Remonstrance* is framed in terms of religious liberty. Indeed, its very opening invokes the freedom of religion clause of the Virginia Declaration of Rights,[22] as does its close.[23] It is significant, too, that defeat of the tax levy led immediately to the enactment of the Statute for Establishing Religious Liberty, whose principal provision is that "no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever. * * *"[24]

If, as we have shown, state support of parochial schools by furnishing textbooks for use in the fulfillment of their religious mission is state support of religion, it follows that such support violates the free exercise of religion.[25] This

22. "Because we hold it for a fundamental and undeniable truth, 'that religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence'." 330 U. S. at 64.

23. "Because, finally, 'the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience' is held by the same tenure with all our other rights." *Id.* at 71.

24. *Id.* at 13.

25. The interference affects not only persons who do not adhere to the faith which the schools teach and promote, but even those who do. The Virginia Statute for Establishing Religious Liberty asserts "that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern * * *." *Ibid.*

could hardly be denied if, as in the case of the Virginia Assessment Bill, a specific tax were levied to finance the new textbook law. But we submit that the fact that the funds come out of the general state and school district treasuries rather than out of a special tax does not obviate the violation of religious liberty. In the complexities of modern society and government, it is impracticable to impose specific taxes for specific purposes. Yet the underlying principle is the same; the compulsion is not eliminated simply because no specific part of the taxpayer's bill is earmarked to finance the new law.

We do not mean to suggest that a pacifist may constitutionally refuse to pay his national income tax or part of it because much of the nation's budget is devoted to financing military expenditures. His religious liberty may be infringed; Thoreau's imprisonment vividly attests to that. However, as this Court has often held, the nation's interest in its own military defense is paramount and may constitutionally justify impairment of religious freedom.[26] While Section 1 of the textbook law here challenged does mention "national defense", we suggest that this invocation should carry little weight since there is hardly any more rational or apparent adverse impact on the national defense from requiring parochial schools to continue to buy their own textbooks, than by not requiring children to salute the national flag.[27]

---

26. See, e.g., *Arver* v. *United States*, 245 U. S. 366 (1918); *Hamilton* v. *Regents of the University of California*, *supra*.

27. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943).

Conclusion

For the reasons set forth herein, the judgment of the New York Court of Appeals should be reversed.

Respectfully submitted,

LEO PFEFFER
ARNOLD FORSTER
EDWIN J. LUKAS
HOWARD M. SQUADRON
EUGENE L. SUGARMAN
Attorneys for Amici

LEO PFEFFER
THEODORE ELLENOFF
PAUL HARTMAN
SAMUEL RABINOVE
SOL RABKIN
JOSEPH B. ROBISON
Of Counsel

March, 1968

Appendix

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT
ALBANY, NEW YORK 12224

January 10, 1966

To: City, Village and District Superintendents
Supervising Principals

Subject: NEW YORK STATE TEXTBOOK LAW (Chapter 320, Laws of 1965) effective as of September 1, 1966

This letter is intended to assist public school boards of education and administrators in the administration of the New York State Textbook Law enacted in the last session of the Legislature. Contained herein is a series of explanations and suggestions, which, it is hoped, will clarify the provisions of the Law and facilitate its operation. (Copies have been sent to non-public authorities for their information.)

1. As has been noted above the Law is effective as of September 1, 1966. It provides that all boards of education and trustees (hereinafter referred to as board (s) have the power and it shall be their duty to purchase and to loan textbooks upon individual request to all children residing in the district enrolled in Grades 7-12 of a public or non-public school which complies with the compulsory education law. This mandate does not apply to children enrolled in Grades K-6.

2. The residence of the child determines the school district which is responsible for the purchase and loan of the textbooks. Requests may therefore come to a board from a number of children who are attending numerous private schools within the State. There is no requirement that a New York State school district provide textbooks for students attending non-public schools outside of the State of New York.

3. The cost of providing these textbooks is an ordinary contingent expense as referred to in Section 2023 of the Education Law.

4. The Law provides that only non-sectarian textbooks shall be provided by a Board. This places a responsibility on each board to make a determination that any textbooks which it provides are of a non-sectarian nature.

5. The request to the board for the loan of textbooks must come from the individual child. However, children may make their requests known to an official in a private school and such private school official may then provide the board with a joint request from a number of such children. The joint request should list the name and address of each child as well as the name and other specific identification of the book requested.

6. Each child to whom books are loaned will be responsible for the care and return of same. The public school officials will be responsible for maintaining adequate records to insure proper accountability for the books issued.

Appendix

To aid in accounting for textbooks issued the public school authorities should stamp each textbook loaned under the program with the name of the public school district indicated as the owner and another identification to indicate that it is related to the New York State Textbook Law to distinguish such books from others purchased under ESEA Title II or through the General Fund appropriation of the school district.

A suggested way of doing this follows:

This Book is the Property
of the
Blank C. S. District
*NYSTL #1

*The code identifies the New York State Textbook Law and the number provides a specific identification for each book, #1, #2, etc.

7. A child who is in attendance in Grades 7-12 of a private school may request and be provided any textbook which has been designated for use in any public elementary or secondary school of the state or is approved by any board. A request may also be received for a textbook which to the best of the board's knowledge, has not previously been designated or approved by any board in the state, in which case the board must decide whether or not to approve it.

8. The Law does not limit the number of textbooks a child may request; however it is reasonable to expect that the board need only provide such textbooks as are needed

in the school he attends to assist in instruction for the current year. It is expected that public and private school authorities will make it possible to use requested textbooks over a period of years rather than requesting new textbooks on an annual basis.

9. The following is suggested as a definition of a textbook for purposes of this Law: A textbook is a book which serves as a primary or basic source for implementing a state or state-approved syllabus or course of study and provided to each student in such a class. It is assumed that the public school, working in conjunction with the private schools, can decide on those books which are generally accepted as textbooks.

10. Since the effective date of this Law is September 1, 1966, it is pointed out that any state aid apportionment will be based only on payments made for textbooks on or after September 1, 1966. This does not preclude the possibility of a school district ordering textbooks any time prior to September 1, 1966, but, in order to be eligible for state aid, payment will need to be made on or after September 1, 1966. It is not possible for a public school to provide textbooks for students in non-public schools prior to September 1, 1966.

11. The Law states "such textbooks are to be loaned free to such children subject to rules and regulations as the board of education may prescribe." A board may prescribe reasonable regulations requiring students to pay for destroyed, lost, or mutilated textbooks, but it may not estab-

lish a fee or deposit for the use of such textbooks because the Law states that such textbooks are to be "loaned free."

12. All books purchased in accordance with this Law are not property of the public school district and may be loaned but not given to the children in private or public schools. It is not necessary that all books be returned to the public school at the end of the year. Each year new requests must be made for the loan of textbooks in the manner described in item 5 above.

13. The Law indicates that state aid shall be apportioned to each school district in an amount equal to the cost of the textbooks purchased and loaned, but in no case shall the aid apportioned to the district be in excess of $10 per pupil for each pupil who resides within the school district and is loaned textbooks. In order that state aid may be apportioned in accordance with this provision, school districts will need to maintain internal records showing the amount expended for textbooks provided for each individual child. *Any expenditure for a child in excess of ten dollars will not be considered for state aid purposes under this Law or under any other state aid provision of the Education Law.*

14. While the first expenditure will be made by school districts during 1966-67, the state aid payments to reimburse the districts will be made in 1967-68.

The information contained in this letter has been developed through the cooperation of appropriate members

of the Education Department, under the Chairmanship of Maurice G. Osborne. Reactions were sought and helpful advice obtained from representative administrators of public and non-public schools.

If questions should arise regarding implementation of this Law at the local level, they may be directed to Education Department officials as follows:

Regarding Textbook Selection—Gordon E. Van Hooft, Chief Bureau of Secondary Curriculum Development

Regarding Accounting and Management Aspects—A. Buell Arnold, Acting Director, Division of Education, Management Services

Regarding State Aid—John W. Polley, Director, Division of Educational Finance

Sincerely yours,

Herbert F. Johnson

SUPREME COURT, U. S.

MAR 25 1968

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 660

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACK, SAND LAKE and NORTH GREENBUSH, RENSSELAER COUNTY and CHATHAM, COLUMBIA COUNTY and BOARD OF EDUCATION OF UNION FREE DISTRICT NO. 3, TOWNS OF NORTH HEMPSTEAD and OYSTER BAY, NASSAU COUNTY, NEW YORK, *Appellants*,

v.

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York, *Appellee*,

and

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH and BARBARA BRENNAN,

Appellees-Intervenors.

BRIEF FOR CITIZENS FOR EDUCATIONAL FREEDOM, AMICUS CURIAE

T. RABER TAYLOR, Esquire
625 American National Bank Bldg.
Denver, Colorado 80202
STUART D. HUBBELL, Esquire
Eighth at Boardman Avenue
Traverse City, Michigan 49684
HERMAN CAHN, Esquire
545 Fifth Avenue
New York, New York 10017

Counsel to Amicus Curiae
Citizens for Educational Freedom

EASTWOOD PRINTING CO. • 2654 LARIMER STREET • DENVER, COLORADO

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and

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH and BARBARA BRENNAN,

Appellees-Intervenors.

BRIEF FOR CITIZENS FOR EDUCATIONAL FREEDOM, AMICUS CURIAE

Interest of CEF as Amicus

Citizens for Educational Freedom (CEF) is a non-sectarian, non-partisan, non-profit, national organization of parents, and other citizens dedicated to an open American society. CEF strives through the democratic processes to win freedom, equality and excellence in education for every American child regardless of race, creed, color,

ancestry, or the character of the school of attendance. It is committed to *fairness to children* . . .

As civic groups the over one thousand local chapters of CEF, are active in thirty-six States and the District of Columbia. CEF has its national office at our Nation's Capital. Various races and creeds are represented in the parents' groups. Its over 150,000 members are as diverse in their geographical distribution as in their social and economic positions.

It is the Citizens' position that the First Amendment inter-dependent freedoms of conscience, of learning, of speech, and of communication are paramount.

CEF supported the passage of the New York Education Law for the loan of textbooks to all pupils in grades seven through twelve as an implementation by the New York Legislature of those First Amendment inter-dependent freedoms of the pupils and their Fourteenth Amendment rights to due process and equal protection of the laws. The New York Law for the loan of textbooks to all pupils is the fruit of the racially and religiously neutral policy of the State of New York to provide the means of education to, and for, all pupils on equal terms.

This brief is filed with the written consent of all of the parties.

SUMMARY OF ARGUMENT

The New York Education Law for the loan of textbooks to all pupils effectuates and does not violate the First Amendment. It is not argued that under present constitutional standards the State of New York was required to include children enrolled in non-public schools, sectarian or non-sectarian, when providing free textbooks. A state may elect to provide a means of education for its

children attending schools complying with the compulsory education law. Providing secular textbooks needed for secular instruction is clearly within a state's discretionary power. So long as such a law is in force, the First Amendment will not tolerate a fetter on the right of any child's learning-freedom especially on the basis of the child's religion.

The New York Education Law for the loan of textbooks to all pupils was designed to satisfy the need for all children for secular textbooks for needed secular education. This was a sound educational objective. The Order and Judgment of the New York Supreme Court, Albany County, disregarded the plain words and purpose of the statute and constructed a religious test. This significant state involvement was violative of the First Amendment religion clauses and of the due process protection of the Fourteenth Amendment.

ARGUMENT

POINT I

The New York Education Law for the Loan of Textbooks to All Pupils Does Not Violate and Does Effectuate the First Amendment.

The New York Education Law for the loan of textbooks to all pupils in grades seven through twelve in all schools speaks for itself of one clear purpose — to provide secular textbooks needed for secular education to any and all pupils on individual request. The Act provides no test and is blind, not to the need, but to the creed, color, national origin, and the character of the school of attendance of the pupil. The secular textbooks are made available at state expense through public selection and distribution.

The majority opinion of the New York Court of Appeals finds that the statute

> "is meant to bestow a public benefit upon all school children, regardless of their school affiliation * * *. The State and local governments have long provided public libraries with books for use by all persons. * * *" and thus "* * * there is no federal constitutional question under the establishment clause of the First Amendment * * * Section 701 remains completely neutral with respect to religion merely mak-available secular textbooks at the request of the individual student and asking no question about what school he attends." (A 66a, 67a)

This *amicus* emphasizes that it is *not* arguing that under present constitutional standards, the New York Legislature was obliged to include children enrolled in non-public schools when providing free textbooks. That question is not before this Court. The fact is the New York Legislature did include all school children without exception, and on an equal basis.

This law does not violate and does effectuate the First Amendment guarantees of freedom.

The First Amendment establishment clause prohibits a state establishment of, or a preference for "a belief or disbelief in any religion", *Torcaso v. Watkins*, 367 U.S. 488 at 495 (1961). The First Amendment also neutralizes the Appellant Board of Education from adopting any established belief to prevail over the child's First Amendment right of freedom of religion. (*West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)).

Each child has a First Amendment right to read. (*Griswold v. Connecticut*, 381 U.S. 479 (1965)). The right of the press to print in an open society, and the right of the teacher to teach are necessary, preferred freedoms in an open society.

These First Amendment guarantees of speech and press "are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system in an open society." (*Time, Inc. v. Hill,* 385 U.S. 374 at 389 (1967)). Also, the First Amendment guarantees of speech and press, when applied to the teacher as a means of education, are not for the benefit of the teacher so much as for the benefit of the student and all of us. (*Keyishian v. Board of Regents of New York,* 385 U.S. 589 (1967); *Speiser v. Randall,* 357 U.S. 513 (1958); *N.A.A.C.P. v. Button,* 371 U.S. 415 (1963)).

Academic teaching-freedom and its "correlary learning-freedom are so essential to the well being of the Nation * * *" that "* * * this Court is always on the alert against intrusion into this constitutionally protected domain." (*Barenblatt v. U. S.,* 360 U.S. 109, 112 (1959)).

The First Amendment learning-freedom of the child in an open society is of benefit to the child, but also for the benefit of all of us and the well being of our Nation.

"The school children and the state alone are the beneficiaries" was the controlling reason for the unanimous decision of this Court in *Cochran v. Louisiana Board of Education,* 281 U.S. 370 (1930) affirming 168 La. 1005, 123 So. 655 (1929).[1]

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[1]Plaintiff did not allege a violation of either First Amendment religion clause. The issue in **Cochran** was made on plaintiff's contention that religion was aided through the state making free school books available for the use of children in parochial schools. The Complaint alleged that this aid was the taking of private property for a private purpose in violation of the Fourteenth Amendment. On January 15, 1968, in **Louisiana Financial Assistance Commission v. Bryan Poindexter, this Court** ____U.S.____, 19 L.ed 2d 780, affirmed the three judge District Court decision (275 F. Supp. 833 at 835) which held: "The free lunches and textbooks Louisiana provides for all its school children are the fruits of racially neutral benevolence. Tuition grants are not the products of such a policy. They are the fruits of the State's traditional racially biased policy of providing segregated schools for white pupils."

Once the state provides a new means of secular education for all children, it may not fetter that means of knowledge any more than the Federal government may fetter an addressee's First Amendment right to receive his mail. (*Lamont v. Postmaster General,* 381 U.S. 301 (1965)).

Prior to 1965, the New York Education Law only authorized school boards to purchase textbooks and either sell or rent them to pupils in public schools. Prior to September 1, 1966, the State of New York, like seventeen other States, did not, at state expense, provide free textbooks for pupils in either secondary public or private schools. The practice in New York was grouped with other states "Not required to provide free textbooks; do not provide rental of textbooks (presumably purchased)". (NEA Research Memo 1963-32, *Selection and Distribution of Elementary and Secondary School Textbooks,* November 1963, pp. 6 and 7). In August 1966, the Educational Research Service of the American Association of School Administrators and the Research Division, NEA, reported on *Methods of Providing Textbooks in Local School Systems,* 1965-66. This report showed that the method of providing textbooks in public secondary schools at Syracuse, New York was: "purchased by all pupils"; at Elmira, New York, grades 10-12: "some free, some purchased"; at Rome, New York: "purchased by all pupils"; at Schenectady, New York, grades 10-12: "rented by all except needy pupils, free to needy"; and at Utica, New York: "rented by all pupils".

The education law for the loan of textbooks to all pupils in grades seven through twelve for the first time in New York's history provided free textbooks at state expense for all pupils, regardless of the character of the school of attendance.

The United States may establish and give up the post

office when it sees fit. The State of New York may enact and repeal a law for the loan of textbooks to pupils. In this respect the State of New York is like the United States. So long as the United States carries the mails, and so long as the New York Law provides for the loan of textbooks to all pupils in specified grades, the First Amendment freedom of speech demands that the rights to receive the material remain unfettered, (*Lamont v. Postmaster General, supra*) especially from fetters based on the recipient's religion.

The public official and those on public payroll may not make educational means, benefits or facilities that have been provided by the state for all children "available in an arbitrary way or exact surrender of freedoms unrelated to the purpose of the facility." (*American Communications Assn. v. Douds,* 339 U.S. 382 at 417 (1950); *Sherbert v. Verner,* 374 U.S. 398 at 404 (1963)).

> "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial or placing of conditions upon a benefit or privilege."

In that same decision the religiously neutral mandate of the First Amendment was reaffirmed, the Court holding that:

> " • • • no State may 'exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation.' *Everson v. Board of Education,* 330 U.S. 1, 16." (374 U.S. at 410) (emphasis in opinion)

In summary, no one argues that under present constitutional standards a state is mandated to include children enrolled in non-public schools when providing free text-

books. A state may elect to provide a means of education for some or all of its children attending schools complying with the compulsory education law. A state may choose not to do so. Providing secular textbooks needed for secular instruction for all children regardless of "the character of the school" of their attendance is clearly within a state's discretionary power. So long as such a law is not repealed, the First Amendment will not tolerate a fetter on the right of any child's learning-freedom especially on the basis of the child's religion. The New York loan of textbooks law does not violate and does effectuate the inter-dependent rights of freedom of conscience, of learning, of speech, and of communication so vital to the existence and progress of our free and open society.

POINT II

The New York Trial Court's Judgment Distorted the Words of the Loan of Textbooks to Pupils Law, Constructed a Religious Test and Significantly Involved New York in Violating the First and Fourteenth Amendments. Therefore, the Judgment of the New York Court of Appeals Should Be Affirmed.

On its face, the New York Education Law for the loan of textbooks to all pupils is neutral as to the religion or race of the child. Its sole concern is the child's need for secular textbooks for needed secular education.

This New York law appears entirely consistent with the views of Mr. Justice Jackson as expressed in his dissent in *Everson v. Board of Education.* His dissent criticized the New Jersey statute that made "the character of the school, not the needs of the children determine the eligibility of parents to reimbursement" for public bus fare for their children to ride to and from school. He

found the New Jersey law did not authorize "transportation to all pupils to all schools * * *." Children "are to be aided if they attend the public schools or private Catholic schools and they are not allowed to be aided if they attend private secular schools or private religious schools of other faiths". (*Everson v. Board of Education*, 330 U.S. 1 at 20 and 21).

Paralleling Mr. Justice Jackson's constitutional test, educators have advocated that the test for good textbook legislation is that it be framed in the interest of the most important party affected, the child.

The *Thirtieth Yearbook of the National Society for the Study of Education* was devoted to "The Textbook in American Education". W. L. Coffey, a national authority on the standards for evaluating textbook legislation and on judicial opinions on textbooks, reported:

> "The fact that some states leave to the school districts or their agents the authority to adopt textbooks while others deal with this subject through a central agency, such as a textbook commission or a board, is not important, except as it might effect the service which the textbook is meant to offer. What is important is whether textbook legislation favors the child and whether courts, to that end, have maintained a liberal policy . . .
>
> "A textbook statute should be framed in the interest of the parties affected. The most important member of these parties is the child. The states' future welfare will depend in part upon the type of training he receives. In this country, the textbook is one of the essential tools used in this training." (*Thirtieth Yearbook of National Society for the Study of Education*, Part II, Public Schools, 1931, pp. 275, 292).

To remove doubts about the constitutionality of the Federal law providing Federal funds for school books "for the use of children and teachers in public and private elementary and secondary schools", Congress solicited advice from constitutional law experts. The Federal law as introduced, focused on school books "to be furnished to schools", after taking "into consideration the relative needs of the schools of the State". (111 *Cong. Rec.* 5563, Daily Ed., March 24, 1965)

Congressman John Brademas of Indiana asked Leo Pfeffer, often counsel for the American Jewish Congress, if he would have grave constitutional doubts if government funds were used for the purchase of textbooks, title to the books resided in a public agency and the books were made available to school children in both public and parochial schools. Mr. Pfeffer answered:

> "I think these constitutional doubts can be solved, and I think careful draftsmanship can avoid them. For example, as I indicated, you cannot make eligibility based on the nature of the school the child attends. Once you do that, you are in trouble. You must make it available to all on equal terms, and it must be a relationship exclusively either between the federal government or a state public agency, and the child, without any intervening school agency. I think that can be done. Something like that can be done. I am not passing judgment. Something like it is being tried in Rhode Island." (Part 2, *Hearings before General Sub-Committee on Education on H.R.* 2361 *and H.R.* 2362, 89th Cong. 1st Sess., pp. 1615, 1618, also 1632).

Amendments of the General Sub-Committee and Full Committee on Education of the House "adopted clarifying language which makes clear that library resources, textbooks, and other printed and published materials, are

not being made available to schools but to children and teachers." (111 *Cong. Rec.* 5563 (Daily Ed., March 24, 1965)). Thus, the "relative need" criterion of Section 203 (a)(3)(A) of Title II, E.S.E.A. was changed from "the relative needs of the schools of the state" to "the relative need of the children and teachers of the state for such library resources, textbooks, or other instructional materials . . .". Title II, states the *Senate Committee Report,* was amended to assure that it was "designed *to benefit children and not schools*". (S. Rep. No. 146, 89th Cong., 1st Sess. 25 (1965)).

Appellant's brief fancies the New York statute to be framed not in the interest of the child as it plainly states, but in the interest of the school. With such a fanciful reading of the law for the loan of textbooks to pupils, the Appellant Board in its brief (p. 25) says:

> "Here it would have to be argued that the *exclusion* of parochial schools from the coverage of the law would constitute a denial of equal protection and a denial of religious freedom."

Neither the New York Court of Appeals, nor the appellees, nor this *amicus* so argue. New York did not have to adopt state tax provided means of secular education for the benefit of all pupils, but it has done so.

Appellant Board, however, is asking this Court to reinstate the Order and Judgment of the Supreme Court, Albany County, that carved out from the benefit of the New York Law any pupils in any private schools "wholly or in part under the control of any religious denomination or in which any denomination tenet or doctrine is taught." (A 3a, Plaintiff's Complaint, paragraph 8). That Supreme Court, Albany County, responded to plaintiff's plea and created a religious test which excludes an entire class of

children on religious grounds. Thus, to this Court is presented a religious test created by a state Court. For a state Court to create such a religious test is significant state involvement and violative of the First Amendment religion clauses and of the due process protection of the Fourteenth Amendment. (*Shelley v. Kramer*, 334 U.S. 1, (1948); *Reitman v. Mulkey*, 387 U.S. 369 (1967)). A reinstatement of that Order and Judgment would render pupils ineligible for secular textbooks needed for secular instruction because of "the character of the school" they attend. Such a reason for ineligibility was condemned by Mr. Justice Jackson in his dissent in *Everson, supra.*

In summary, the New York Education Law for the loan of textbooks to all pupils was designed to satisfy the need for all children for secular textbooks for needed secular education. This was a sound educational objective. The Order and Judgment of the New York Supreme Court, Albany County, disregarded the plain words and purpose of the statute and constructed a religious test. This significant state involvement was violative of the First Amendment religion clauses and of the due process protection of the Fourteenth Amendment.

CONCLUSION

It is respectfully submitted that the Judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted,

T. Raber Taylor
Stuart D. Hubbell
Herman Cahn

Attorneys for Amicus

March 19, 1968.

No. 660

JOHN F. DAVIS, CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1967

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACK, SAND LAKE AND NORTH GREENBUSH, RENSSELAER COUNTY AND CHATHAM, COLUMBIA COUNTY AND BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3, TOWNS OF NORTH HEMPSTEAD AND OYSTER BAY, NASSAU COUNTY, NEW YORK,

Plaintiffs-Appellants,

against

JAMES E. ALLEN, JR., AS COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendant-Respondent,

and

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH AND BARBARA BRENNAN,

Intervenor-Defendants-Respondents.

BRIEF FOR STATE OF LOUISIANA AMICUS CURIAE

JACK P. F. GREMILLION,
Attorney General of the State of Louisiana.
Attorney for Amicus Curiae.

WILLIE D. MAYNOR,
Special Counsel to the Attorney General
of Counsel

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In the Supreme Court of the United States

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Intervenor-Defendants-Respondents.

BRIEF FOR STATE OF LOUISIANA AMICUS CURIAE

STATEMENT

Your Honors granted a Writ of Certiorari to review the decision of the Court of Appeals of the State of New York, which is reported at 20 N.Y. 2d 109, 281 N.Y.S. 2d 799, 228 N.E. 2d 791. The sole question to be decided is whether New York's Textbook Loan Law, Section 701 of the Education Law, Consol. Laws,

c. 16, runs afoul of the Establishment Clause of the First Amendment to the United States Constitution.

Education Law, Sec. 701, as amended by Laws of 1965, Chapter 320, provides in pertinent part that:

> "In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities."

New York Court of Appeals

Answering the contention that the above statute violates Article XI, Section 3 of the New York Constitution, which prohibits the use of property, credit or funds belonging to the State or subdivision of the State for aiding or maintaining, either directly or indirectly, church schools, the New York Court of Appeals reasoned as follows:

> "The purpose underlying section 701, found in the Legislature's own words (L. 1965, ch. 320, § 1; supra), belies any interpretation other than that the statute is meant to bestow a public benefit upon all school children, regardless of their

school affiliations. There can be no serious suggestion that the declaration of purpose by the Legislature was a verbal smoke screen designed to obscure a nefarious scheme to circumvent the New York State Constitution. No one in the last third of the 20th Century can doubt that a program aimed at improving the quality of education in all schools is a matter of legitimate State concern.

"Since there is no intention to assist parochial schools as such, any benefit accruing to those schools is a collateral effect of the statute, and, therefore, cannot be properly classified as the giving of aid directly or indirectly.

"Only textbooks designated for use by the public schools or approved by Boards of Education, trustees or school authorities may be lent (Education Law, § 701, subd. 3). The State and local governments have long provided public libraries with books for use by all persons. It is not uncommon for schools, public and private alike, to assign various 'outside readings' to pupils. Children often, then, fulfill assignments for courses in both public and private schools by means of using and borrowing from public libraries. We do not consider this indirect aid to private or parochial schools." 20 N.Y. 2d 109, 116, 281 N.Y.S. 2d 799, 804, 228 N.E. 2d 791, 794.

In also holding that there was no federal constitutional question under the Establishment Clause of the First Amendment, the Court of Appeals reasoned:

"The State makes no affirmation of religious beliefs or activities within the public schools. Sec-

tion 701 remains completely neutral with respect to religion, merely making available secular textbooks at the request of the individual student and asking no question about what school he attends. Despite the flexibility of the English language, it is impossible to conclude that loaning nonreligious textbooks to all students, including those who attend a parochial school, establishes a religion or constitutes the use of public funds to aid religious schools. (cf. *Everson v. Board of Educ. of Ewing Tp.*, 330 U.S. 1, 16, 18, 67 S.Ct. 504, 91 L.Ed. 711)." 20 N.Y. 2d 109, 117, 281 N.Y.S. 2d 799, 804, 228 N.E. 2d 791, 794-5.

Louisiana Textbook Case

This Honorable Court, in *Cochran v. Louisiana State Board of Education*, 281 U.S. 370, 50, S.Ct. 335, 74 L.Ed. 913, held Act 100 of the 1928 Regular Session of the Louisiana Legislature, constitutional, affirming the decision of the Louisiana Supreme Court reported at 168 La. 1020, 123 So. 664.

The text of Act 100 of 1928 (R.S. 17:351-353) is as follows:

"Section 1. Be it enacted by the Legislature of Louisiana, That the Severance Tax Fund of the State, as levied by Act 140 of 1922, as amended, shall be devoted after allowing funds and appropriations as provided by the Constitution of the State, first, to supplying school books to the school children of the State of Louisiana, and that thereafter such further sums as remain in the said Severance Tax Fund shall be transferred to the State public school funds.

"Sec. 2. That the State Board of Education of Louisiana shall provide the said school books for school children free of cost to such children out of said tax fund, and thereafter apply the remaining sums out of the said Severance Tax Fund to the State public school funds.

"Sec. 3. That this act shall not apply to persons attending colleges and universities."

The Louisiana Supreme Court affirmed the judgment of the District Court, assigning as reasons for the affirmance the reasons assigned in *Borden v. Louisiana State Board of Education*, 168 La. 1005, 123 So. 655, 67 A.L.R. 1183.

Article XII, Section 13 of the Louisiana Constitution provides in pertinent part that "no public funds shall be used for the support of any private or sectarian school." Article IV, Section 12 of the Louisiana Constitution provides in pertinent part that "the funds, credit, property or things of value of the State, or of any political corporation thereof, shall not be loaned, pledged or granted to or for any person or persons, associations or corporations, public or private."

The Louisiana Supreme Court, per Overton, J., held that Act 100 of 1928 did not violate either Article IV, Section 12 or Article XII, Section 13. In so holding, the Court reasoned as follows:

"The appropriations were made for the specific purpose of purchasing school books for the use

of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or non-sectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries. It is also true that the sectarian schools, which some of the children attend, instruct their pupils in religion, and books are used for that purpose, but one may search diligently the acts, though without result, in an effort to find anything to the effect that it is the purpose of the state to furnish religious books for the use of such children. In fact, in view of the prohibitions in the Constitution against the state's doing anything of that description, it would be legally impossible to interpret the statute as calling for any such action on the part of the state, for where a statute is susceptible of two constructions, one of which makes it unconstitutional and the other constitutional; the interpretation making it constitutional must be adopted. What the statutes contemplate is that the same books that are furnished children attending public schools shall be furnished children attending private schools. This is the only practical way of interpreting and executing the statutes, and this is what the state board of education is doing. Among these books, naturally, none is to be expected, adapted to religious in-

struction." 168 La. 1005, 1020-21, 123 So. 655, 660-61.

The above language is quoted at 281 U.S. 370, 374-5, 74 L.Ed. 913, 915.

In *Borden, supra,* the contention was made that the lending of textbooks to the children was a violation of Article IV, Section 12 of the State Constitution. The Louisiana Supreme Court answered that contention as follows:

> "As relates to the contention that the statutes violate section 12 of article 4 of the Constitution, we do not find this contention well founded. The school books are not granted or donated to the children. The donating of them would have been unnecessary to the accomplishing of the purpose of the statutes. It is only the use of the books that is granted to the children, or, in other words, the books are lent to them, which implies that they are to be returned. While it is true that there is a lending here of things of value, belonging to the state, still this lending is not the lending prohibited by the Constitution. The lending there contemplated is a lending not connected with the reasonable exercise of the police power. Where the granting or lending of anything of value, belonging to the state, or any political corporation thereof, is necessary in the reasonable exercise of the police power, section 12 of article 4 of the Constitution was not intended to prevent the granting or lending. Were it otherwise, the state, or a municipal corporation, could not furnish, for instance, vaccine for the prevention of an epidemic,

> In fact, the Constitution presupposes the existence of the police power and is to be construed with reference to that fact. 12 C.J. § 415, p. 907; 6 R.C.L. § 193, p. 195. The furnishing of school books to the children of the state, for their use, in attending school, tends directly to promote the education of the children of the state and to obliterate illiteracy, thereby improving the morals of the children and promoting the general welfare and safety of the people, and hence comes within the police power. Cf. *Barbier v. Connolly*, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923. Our conclusion is that the foregoing pleas, directed against both acts, should be overruled." 168 La. 1005, 1021-22, 123 So. 655.

This Honorable Court, in *Cochran, supra*, commenting on the State Supreme Court's language, stated:

> "The court also stated, although the point is not of importance in relation to the Federal question, that it was 'only the use of the books that is granted to the children, or in other words, the books are lent to them.'" 281 U.S. 370, 375, 50 S.Ct. 335, 74 L.Ed. 913, 915.

In upholding the constitutionality of Act 100 of 1928, the Court reasoned:

> "Viewing the statute as having the effect thus attributed to it, we can not doubt that the taxing power of the state is exerted for a public purpose. The legislation does not segregate private schools or their pupils, as its beneficiaries, or attempt to interfere with any matters of exclusively private

concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded." 281 U.S. 370, 375, 50 S.Ct. 335, 74 L.Ed. 913, 915.

New Jersey Transportation Case

In *Everson v. Board of Education of Ewing Township*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711, 168 A.L.R. 1392, one issue presented to this Honorable Court was whether a New Jersey statute and a Board resolution passed pursuant thereto which authorized the Board to reimburse parents of students the amount of money spent on bus fares to attend parochial schools as well as public schools violated the Establishment Clause of the First Amendment to the Federal Constitution. In holding that the First Amendment was not violated, Mr. Justice Black, speaking for the majority, reasoned:

> ". . . [W]e cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State. The same possibility exists where the state requires a local transit company to provide re-

duced fares to school children including those attending parochial schools, or where a municipally owned transportation system undertakes to carry all school children free of charge. Moreover, state-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare. And parents might refuse to risk their children to the serious danger of traffic accidents going to and from parochial schools, the approaches to which were not protected by policemen. Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.

"This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the

secular educational requirements which the state has power to impose. See *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, 39 A.L.R. 468. It appears that these parochial schools meet New Jersey's requirements. The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.

"The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here." 330 U.S. 1, 17-18, 67 S.Ct. 504, 512-13, 91 L.Ed. 711, 168 A.L.R. 1392, 1405-06.

The decisions of this Honorable Court in *Cochran, Supra*, and *Everson, supra*, are authority for the proposition that New York's Text Book Loan Law is not repugnant to the First Amendment to the United States Constitution. The books are loaned to the students and not the schools. Equally applicable to the case at bar is the statement made by the Louisiana Supreme Court in *Borden v. Louisiana State Board of Education*, i.e., "The schools, however, are not the beneficiaries of those appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. *The school children and the state alone are the beneficiaries.*" 168 La. 1005, 1020, 123 So. 655, 660, also quoted at 281 U.S. 375, 74 L.Ed. 915.

CONCLUSION

The decision of the New York Court of Appeals should be affirmed.

Respectfully submitted,

JACK P. F. GREMILLION,
Attorney General
of Louisiana,
Attorney for Amicus Curiae,
State of Louisiana

WILLIE D. MAYNOR,
Special Counsel to the
Attorney General
of Counsel

CERTIFICATE

I hereby certify that copies of Brief of Amicus Curiae, State of Louisiana, have been served on the attorneys for appellants, respondent, and intervenors-respondent by mailing the same to Marvin E. Pollock, Esquire, 80 Pine Street, New York, N. Y. 10005; Porter R. Chandler, Esquire, One Chase Manhattan Plaza, New York, N. Y. 10005; and Honorable Louis J. Lefkowitz, Department of Law, Albany, N. Y., by United States Air Mail, postage prepaid.

Baton Rouge, Louisiana, this 27 day of March, 1968.

Willie D. Mayronne
Of Counsel

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 28 1968
JOHN F. DAVIS, CLERK

In the
Supreme Court of the United States
OCTOBER TERM, 1967
No. 660

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACH, SAND LAKE AND NORTH GREENBUSH, RENSSELAER COUNTY AND CHATHAM, COLUMBIA COUNTY AND BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3, TOWNS OF NORTH HEMPSTEAD AND OYSTER BAY, NASSAU COUNTY, NEW YORK,
APPELLANTS,

v.

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York,
APPELLEE,

- and -

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH AND BARBARA BRENNAN,
INTERVENORS-APPELLEES.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR AMICUS CURIAE
Attorney General of Rhode Island
Attorney General of Pennsylvania
Attorney General of Vermont

JAMES L. OAKES,
Attorney General of Vermont
Montpelier, Vermont 05602
WILLIAM C. SENNETT,
Attorney General of Pennsylvania
Harrisburg, Pennsylvania

HERBERT F. DESIMONE,
Attorney General of Rhode Island
Providence, Rhode Island 02903
CHARLES G. EDWARDS,
Assistant Attorney General of Rhode Island
Providence, Rhode Island 02903

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APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

AMICUS CURIAE BRIEF

Interest of the AMICI

This brief is submitted persuant to Rule 42(4) of the Rules of the United States Supreme Court on behalf of the Attorney General of Rhode Island and other interested public officials similarly situated.

The Attorney General of Rhode Island is interested in the outcome of the instant case because a Rhode Island statute similar to the New York Statute challenged in this case (Laws of 1965, ch. 320: Education Law, # 701.3; McKinney's Consol. Laws of New York) is the subject of litigation in Rhode Island. This law, Section 16-23-2 of the Rhode Island General Laws (1956), as amended, was declared unconstitutional on September 19, 1967 by a justice of the Superior Court in a decision which is now on appeal before the Rhode Island Supreme Court. The Rhode Island judgment now on appeal rested, as one ground, on the Fourteenth Amendment as "incorporating" the non-establishment clause of the First Amendment.

The challenged Rhode Island statute provides as follows:

> "*16-23-2. Loan of textbooks.* — The School committee of every community as the same is defined in [§ 16-7-16] shall furnish upon request at the expense of such community, textbooks in the fields of mathematics, science and modern foreign languages appearing on the published list of textbooks recommended by the commissioner of education as provided in § 16-1-9 of the general laws, as herein amended, to all pupils of elementary and secondary school grades resident in such community, said textbooks to be loaned to such pupils free of charge, subject to such rules and regulations as to care and custody as the school committee may prescribe.
>
> "Every such school committee shall also furnish at

> the expense of such community all other textbooks and school supplies used in the public schools of said community, said other textbooks and supplies to be loaned to the pupils of said public schools free of charge, subject to such rules and regulations as to care and custody as the school committee may prescribe. School books removed from school use may be distributed to pupils, and any textbook may become the property of a pupil who has completed the use of it in school, subject to rules and regulations prescribed by the school committee."

In a brief filed as an intervening defendant-appellant in the case of *Frederick E. Bowerman et al* v. *John J. O'Connor, Jr., et al,* (Rhode Island Supreme Court No. 287-A) the attorney general of Rhode Island has urged the reversal of the decision of the Superior Court judge noted above and has argued that the challenged Rhode Island statute in no way constitutes an establishment of religion in violation of the Fourteenth Amendment as "incorporating" the establishment clause of the First Amendment of the Constitution of the United States.

This brief is submitted to demonstrate that the New York law in issue in this case is, like the Rhode Island statute noted above, a valid exercise of the power of the state to provide secular educational benefits to all children regardless of the school they attend. This brief also urges that the laws in five states, in addition to New York and Rhode Island, which permit textbooks to be loaned to children attending private schools are also constitutional. La. Rev. Stat. Tit. 17, §351 (1963); Miss. Code Ann. 1942, Tit. 24, §6656 (1952); W.Va. Code Ann. §18-5-21b (1966); Burns Indiana Stat. Ann. 1933, §28-512 (1948); Kansas Stat. Ann. §72-4107 (1964).

Statement of the Case

For purposes of this brief, we adopt the Statement of Case contained in the brief of Michael Rock, et al, intervenors-appellees, as follows:

Chapter 320 of the New York Laws of 1965 and Chapter 795 of the Laws of 1966 (effective September 1, 1966) amend Section 701 of the New York Education Law to provide, *inter alia,* that the boards of education throughout the state shall purchase textbooks "designated for use in any public, elementary or secondary schools of the state or . . . approved by any boards of education, trustees or other school authorities" and loan them "upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law. . . ." The textbooks are not loaned to any school. They are made available directly to the pupils.

The amended Section 701 embodies the New York Legislature's recognition that availability to all children of high quality education in secular subjects is a matter of pressing public concern. The preamble declaring the Legislature's purposes in enacting the amendment to Section 701 states:

> "Section 1. Statement of policy. The security and welfare of the nation require the fullest development of the mental resources and skills of its youth. This calls for more adequate educational opportunities and increased efforts to educate more of the talent of our nation and requiring the correction of those imbalances in our educational programs which have led to an insufficient proportion of our population educated in the field of science, mathematics, foreign languages and other non-sectarian subjects. The Congress of the United States has reaffirmed the principle that the states and local communities retain primary respon-

> sibility for public education. It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state." N. Y. Sess. Laws 1965, Ch. 320, § 1.

Appellants' complaint herein sought a declaratory judgment that Section 701.3 of the New York Education Law is contrary to the New York State Constitution and the Establishment Clause of the First Amendment to the extent that it requires the purchase of textbooks with public moneys for free loan to pupils in church-related schools. Appellants nowhere claim that the statute is unconstitutional in so far as it provides for the loan of books to pupils attending public schools or non-religiously-affiliated private schools.

The Supreme Court, Albany County, ruled that plaintiffs had standing to sue and ruled in favor of plaintiffs on the merits (63-72; 51 Misc. 2d 297, 273 NYS 2d 239 (1966)). The Appellate Division, Third Department, held that plaintiffs lacked standing to sue. (88-90; 27 A.D. 2d 69, 276 N.Y. S. 2d 234 (1966)). Although three of the justices in the Appellate Division, because of their finding that the plaintiffs lacked standing to sue, found it unnecessary to rest their decision on the merits all five Justices were unequivocal in their opinion that the statute was not in violation of either the New York or the United States Constitution. (89, 96-104; 27 A.D. 2d at 71, 75-80, 276 N.Y. S2 at 237, 241-46.)

The Court of Appeals reached the merits, holding that the statute was a constitutional exercise of the New York Legislature's authority to provide for the secular education of all children within the state, and did not contravene

either Article XI, Section 3 of the New York Constitution or the First Amendment to the Federal Constitution. (13-28; 20 N.Y.2d 109, 228 N.E.2d 791 (1967). The court dealt first with constitutionality under Article XI, § 3 of the New York Constitution, which prohibits use of state money, property, or credit "directly or indirectly, in aid or maintenance" of any church-related school. The court held that, since Section 701 was designed not to aid religion either directly or indirectly but to benefit all school children by improving their secular education, "any benefit accruing to . . . [religiously-affiliated] schools is a collateral effect of the statute, and, therefore, cannot be properly classified as the giving of aid directly or indirectly." (20; 20 N.Y. 2d at 116, 228 N.E.2d at 794). The court noted the similarity of the textbook loan program to the activities of public libraries, which routinely loan books to parochial school students without any suggestion that the state is thereby providing unconstitutional aid to religiously-affiliated schools.

The Court observed that:

> "No one in the last third of the 20th Century can doubt that a program aimed at improving the quality of education in all schools is a matter of legitimate state concern . . .
>
> At a time when we have large-scale Federal and State aid to education, it is justly feared that children who are denied these benefits may receive education inferior to children in public schools. Unless certain types of aid can be made available to *all* children, we run the risk of creating an educational lag between children in public and private schools." (20-21; 20 N.Y.2d at 116-17, 228 N.E.2d at 794)

The Court firmly held that there was no violation of the First Amendment:

"The State makes no affirmation of religious beliefs or activities within the public schools. Section 701 remains completely neutral with respect to religion, merely making available secular textbooks at the request of the individual student and asking no question about what school he attends. Despite the flexibility of the English language, it is impossible to conclude that loaning non-religious textbooks to all students, including those who attend a parochial school establishes a religion or constitutes the use of public funds to aid religious schools. (Cf. *Everson* v. *Board of Educ.*, 330 U.S. 1, 16, 18).

"As a practical matter, to deny private school children the benefit of the State aid provided by section 701 could widen the gap between those children in deprived areas who attend parochial schools and those attending public schools in the same areas who receive the benefits of all the many and necessary programs backed by the massive resources of both State and Federal Governments." (21-22; 20 N.Y. 2d at 117-18, 228 N.E.2d at 794-95).

The dissenting judges, while declaring that amended Section 701 infringed the New York Constitution, gave no definitive opinion with respect to the status of Section 701 under the Federal Constitution, but merely expressed uncertainty in that regard. (24-28; 20 N.Y.2d at 120-24, 228 N.E.2d at 796-99).

Question Presented

1. Does the lending of secular textbooks to all New York school children, including those attending church-related schools in grades seven to twelve, pursuant to the provisions of New York's Textbook Loan Law, constitute an

establishment of religion which violates any provision of the Fourteenth Amendment of the Constitution of the United States, insofar as that Amendment may incorporate any portion of the First Amendment?

Argument

I. THE LENDING OF TEXTBOOKS TO ALL NEW YORK SCHOOL CHILDREN, INCLUDING THOSE WHO ATTEND CHURCH-RELATED SCHOOLS IN GRADES SEVEN TO TWELVE, PURSUANT TO THE PROVISIONS OF NEW YORK'S EDUCATION LAW # 701.3, IS NOT VIOLATIVE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The Court of Appeals in the instant case held the New York textbook statute not to violate the establishment clause of the First Amendment to the Constitution of the United States, as made applicable to the States through the Fourteenth Amendment. With due recognition of the difficulty of the constitutional issue raised under the First Amendment, it is submitted that this decision reflects the law as it is and as it ought to be.

Initially, it is clear that the only arguably plausible federal constitutional objection to the textbook statute involves the Fourteenth Amendment, assuming that the Fourteenth inhibits the States just as the establishment clause of the First Amendment inhibits the Congress. Any argument that State taxation for the purpose of supplying textbooks to school children, including those attending church-related schools, amounts to the taking of property for a private purpose in violation of the due process clause of the Fourteenth Amendment was foreclosed emphatically by the decision in

Cochran v. *Board of Education*, 281 U.S. 370 (1930)

In that case, the Court validated a Louisiana textbook statute similar in legal effect to that now at issue. As the Court stated, citing *Cochran*, in

Everson v. *Board of Education*, 330 U.S. 1, 7 (1947)

> "It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose."

Cochran establishes beyond question that the teaching of secular subjects in a parochial school constitutes the performance of a *public function* and that a State may furnish at public expense secular textbooks to parochial and public school children alike, without thereby violating the Fourteenth Amendment.

The fact that *Cochran* was decided in 1930 does not lessen its First Amendment significance. On the contrary, the Supreme Court, five years before *Cochran* and twice shortly after *Cochran*, stated that the Fourteenth Amendment protected certain of the fundamental personal rights and liberties protected by the First against abridgement by Congress. In *Gitlow* v. *New York*, 268 U.S. 652 (1925), Mr. Justice Sanford wrote for the majority, (p. 666):

> "For present purposes we may and do assume that freedom of speech and of the press — which are protected by the First Amendment from abridgement by Congress — are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."

Justice Holmes and Brandeis, though they dissented from the Court's judgment, agreed with the substance of the statement just quoted. Holmes wrote (p. 672):

> "The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs, or ought to govern, the laws of the United States."

Thus all the justices, in 1925, accepted the principle that the Fourteenth included some First Amendment liberties. On June 8, 1925, the day *Gitlow* was handed down, the Court consisted of Chief Justice Taft, and Associate Justices Holmes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Sanford, and Stone. On April 28, 1930, when the Court decided *Cochran,* Chief Justice Hughes had replaced Taft, and associate Justice Sanford had died. Otherwise the Court was composed of the same men who had decided *Gitlow* five years earlier.

In *Near* v. *Minnesota,* 283 U.S. 697, 707 (1931), Chief Justice Hughes writing the Court's opinion, cited *Gitlow* in support of his statement "It is no longer open to doubt that the liberty of the press, and of speech; is within the liberty safeguarded by the due process clause of the Fourteenth Amendment . . ."

In *Hamilton* v. *Regents,* 293 U.S. 245 (1934), the unanimous Court decided that compulsory military training, required of students at the University of California, a State institution, did not deprive plaintiff-students of their freedom of religion without due process of law. In his opinion for the Court, Mr. Justice Butler, discussing the Fourteenth Amendment, stated (P. 262):

> "There need be no attempt to enumerate or comprehensively to define what is included in the 'liberty' protected by the due process clause. Undoubtedly it does include the right to entertain the beliefs, to adhere to the principles and to teach the doctrines on which these students base their objections to the order prescribing military training. (Citations omitted).

Mr. Justice Cardozo's concurring opinion in *Hamilton,* in which Justices Brandeis and Stone joined, contains the following statement (pp. 265-66):

> "I assume for present purposes that the religious liberty protected by the First Amendment against invasion by the nation is protected by the Fourteenth Amendment. . . . The First Amendment, if it be read into the Fourteenth, makes invalid any state law 'respecting an establishment of religion or prohibiting the free exercise thereof.' Instruction in military science is not instruction in the practice or tenets of a religion. Neither directly nor indirectly is government establishing a state religion when it insists upon such training. Instruction in military science, unaccompanied here by any pledge of military service, is not an interference by the state with the free exercise of religion when the liberties of the constitution are read in the light of a century and a half of history. . . ."

When the Court decided *Hamilton* in 1934, Justices Roberts and Cardozo had been added, and Holmes had resigned. Otherwise *Hamilton* was decided by the same Court which had decided *Cochran* in 1930. Six of the *Hamilton* Justices had sat on the Court which decided *Gitlow* in 1925. It seems difficult to believe that in 1930 the *Cochran* justices were unaware that the Fourteenth Amendment guaranteed a

number of liberties of the First; it is impossible to believe that in 1930 the Court would have upheld a State law which impeded the free exercise of religion.

From Cochran, down to the present day, the Supreme Court has never held invalid any State law which aids school children at public expense, but which contains no element of religious constraint. The Supreme Court of the United States has invalidated religious instruction in public schools, even when given by unpaid volunteer teachers, *McCollum* v. *Board of Education,* 333 U.S. 203 (1948); it has invalidated prayers and devotional bible-reading in public schools. *Engel* v. *Vitale,* 370 U.S. 421 (1962); *School Dist.* v. *Schempp; Murray* v. *Curlett,* 374 U.S. 203 (1963). In all instances the school child could get excused from the exercise; but some pressure, some embarrassment, some public urging to conform, necessarily inhered in the system. Children do not like obviously to differ from their fellows.

The Supreme Court has repeatedly upheld transportation of schoolchildren at public expense, to public and parochial schools alike. *Everson* v. *Board of Education,* 330 U.S. 1 (1947); *Snyder* v. *Town of Newton,* 365 U.S. 299 (1961) (appeal from Supreme Court of Connecticut dismissed for want of a substantial federal question). The Supreme Court upheld the release from public school for stated hours of pupils whose parents wished them to attend religious instruction elsewhere. *Zorach* v. *Clauson,* 343 U.S. 306 (1952). It has upheld tax exemption of "Buildings for religious purposes and the land on which they stand, not exceeding one acre, to the extent such buildings and land are used for religious *or educational purposes;*" (Emphasis added), *General Fin. Co.* v. *Archetto,* 93 R.I. 392 (1961), appeal dismissed for want of a substantial federal question, 369 U.S. 423 (1962). See also *Gibbons* v. *District of Columbia,* 116 U.S. 404 (1886).

> "Votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case. . . ." M Justice Brennan, in *Eaton* v. *Price,* 360 U.S. 246 (1959). And see *Baskin* v. *Industrial Accident Comm'n.,* 338 U.S. 854 (1949).

See also *Bradfield* v. *Roberts,* 175 U.S. 291 (1899).

Various expressions of Justices, uttered in opinions for the Court, or in special concurring opinions, or in dissents, suggest that the "establishment clause" of the First Amendment is "incorporated" *literatim* in the due process clause of the Fourteenth.

The decisions of the Supreme Court of the United States when marshalled, fall into a logical and sensible pattern. When public power of a State takes some action which inhibits or embarrasses some person in connection with his religion, the Supreme Court has struck it down. But when a taxpayer has complained that tax money is spent for the secular benefit of a schoolchild or for a sick person, with no element of personal constraint in connection with religion, the court has uniformly upheld the State action.

And certainly the Supreme Court has never struck down such a State practice as that in New York where a schoolchild is merely permitted to borrow secular textbooks provided by the state for the student's own use, without regard to what school he attends. No decision of the Supreme Court of the United States has suggested that because such a child then takes the book to use in a church-related school, the distribution by the State is a violation of some constitutional prohibition latent and unstated in the Fourteenth Amendment.

The Court of Appeals in the instant case quite properly recognized *Everson* v. *Board of Education, supra,* as the

single most important precedent with respect to the issues here to be determined. In the *Everson* case, the Court had occasion to consider, for the first time, the problem of governmental aid to parochial school pupils within the context of the First Amendment. In that case, Mr. Justice Black, speaking for a majority of the Court, made the following general statement (pp. 15-16):

> "The 'establishment of religion' clause of the First Amendment means at least this: . . . No tax in any amount, large or small, can be levied to support *any religious activities or institutions* whatever they may be called, or whatever form they may adopt *to teach or practice religion.* . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'" (Citation omitted. Emphasis added).

Beyond the seemingly straightforward nature of the above formulation, however, the Court in *Everson* was intimately aware of what it termed (p. 14) the:

> "difficulty in drawing the line between tax legislation which provides funds for the Welfare of the general public and that which is designed to support institutions which teach religion."

This, of course, is the crucial issue in this case: How do we distinguish aid to the public in general from aid to religion in particular? Mr. Justice Clark, speaking for the Court in *School Dist.* v. *Schempp,* 374 U.S. 203 (1964), enunciated the relevant considerations necessary to make such a determination, when he stated (p. 222):

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause *there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.*" (Citations omitted. Emphasis added).

The *Everson* case, *supra,* represents the most difficult and significant attempt heretofore to apply the establishment clause to a particular type of governmental aid. At issue in that case was a New Jersey statute which authorized local school districts to make rules and contracts relating to the transportation of children to and from schools. Pursuant to this statute, a township board of education authorized reimbursements to parents for money expended by them for the bus transportation of their children by the public transportation system. A portion of the funds was used for the payment of transportation of certain children to Catholic parochial schools. These schools provided, beside regular secular education, "regular religious instruction conforming to the religious tenets and modes of worship of the Catholic Faith." The appellant, a district taxpayer, challenged the payment of funds to the parents of parochial school students on the grounds, among others, that such payments violated the due process clause of the Fourteenth Amendment and constituted an establishment of religion within the meaning of the First Amendment, which Everson contended was made applicable to the States by the Fourteenth. After disposing of the due process argument on the authority of *Cochran, supra,* the Court proceeded to consider whether the New Jersey statute was "a law respecting an establishment of religion." Having

broadly characterized the limits of State power under the establishment clause in the previously quoted portion of his opinion, Mr. Justice Black paused to consider the relevance of the complementary free exercise clause (p. 16):

> "While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, *to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benfits to all its citizens without regard to their religious belief.*" (Emphasis added).

The groundwork thus having been laid, the Court held that the operation and effect of the New Jersey statute did not constitute an establishment of religion.

The Court stated (p. 17-18):

> "Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the state. The same possibility exists where the state requires a local transit company to provide reduced fares to school children including those attending parochial schools, or where

a municipally owned transportation system undertakes to carry all school children free of charge. Moreover, state-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare. And parents might refuse to risk their children to the serious danger of traffic accidents going to and from parochial schools, the approaches to which were not protected by policemen. Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it it to favor them." (Emphasis added.)

Obviously, the Court recognized the fact that the New Jersey statute might aid parents in sending their children to parochial schools, indirectly benefitting those schools, The Court also recognized that providing certain other welfare services, such as police and fire protection, sewerage and highways, resulted in much the same sort of incidental benefit, in the sense that the denial of those services

"would make it far more difficult for the schools to operate." Nevertheless, the *Everson* decision sanctioned such incidental aid in areas where the service provided by the State was "so separate and indisputably marked off from the religious function." In sum, the Court viewed the establishment clause as requiring of a State only *neutrality* in its relations with religious believers and non-believers, and not hostility.

It must be noted that *Everson* did not assert that the constitutional limit of a State's power under the Fourteenth Amendment, applying any principle of the First, may be defined in terms of the amount of money to be expended under a particular legislative enactment. Surely this cannot be a valid constitutional test. Would the Court in *Everson* have struck down the New Jersey statute had it provided that pupils were to be transported to their schools in more expensive buses. We suggest that the actual or potential monetary scope of a statute is not a relevant or permissible measure of its constitutionality. The relevant issue concerns the maximum scope of legislative power under the constitutional mandate, not the particular extent to which a legislature, in its wisdom, may choose to implement that power.

The scope of permissible legislative power is also to be measured by the standard declared by the Supreme Court, namely, whether the enactment has a *secular legislative purpose and a primary effect that neither advances nor inhibits religion. School Dist.* v. *Schempp*, 374 U.S. 203, 222 (1964). It is impossible to declare that the legislative purpose behind the New York textbook statute is other than secular or that the *primary* effect of its implementation is either to advance or inhibit religion.

The decision of the Court of Appeals in the *Allen* case, 281 N.Y. 2d 799 228 NE 2d 791, follows these principles when it states "that there is no federal constitutional ques-

tion under the establishment clause of the First Amendment" because the Textbook Loan Law "remains completely neutral with respect to religion, merely making available secular textbooks at the request of the individual student and asking no question about what school he attends." 228 N.E. 2d 791, at 794.

The decision below thus follows the so-called "child-benefit" theory underlying *Cochran* and implicit in the *Everson* decision. As stated by the Supreme Court in *Cochran,* in upholding the Louisiana textbook law:

> "One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian or even public school. The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or non-sectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries. . . . What the statutes contemplate is that the same books that are furnished children attending public schools shall be furnished children attending private schools. . . ." pp. 374-375.

This rigorously logical reasoning in the unanimous ruling in *Cochran* has not been modified but rather reinforced by *Everson* and *Schempp.* The dissent in the Court of Appeals

suggests hesitatingly that *McCollum* (supra), *Engel,* (supra) and *Schempp* "seem to have outdistanced *Cochran*" (228 NE 2d 791 at 797) but the fact is that *Cochran, Everson* and *Schempp* affirm and reaffirm that the state neutrality between religion and irreligion is the basic guideline in applying the establishment clause of the First Amendment. Indeed *Everson*'s stature as a precedent has been enhanced in succeeding years, as witness the fact that all attacks on state bus transportation laws have been rejected by the Supreme Court as failing to represent any substantial federal question. See, e.g., *Snyder* v. *Town of Newton,* 365 U.S. 299 (1961); *Rhoades* v. *School Dist.,* 424 Pa. 202, 226 A.2d 53, *appeal dismissed,* 88 S.Ct. 61 (1967); *Worrell* v. *Matters,* 424 Pa. 202, 226 A.2d 53, Cert. denied, 88 S.Ct. 36 (1967).

We submit that the rule of *Everson* is simply that government aid may be rendered to a citizen in furtherance of his obtaining secular education in a church-related school. The guiding principle of the case, as stated, requires the state to maintain neutrality in its relations with groups of religious believers and non-believers. *Everson, supra,* p. 18. Whatever may be the type of state aid to religion proscribed by *Everson,* on the other hand, it is clearly not:

> ". . . . those incidental advantages that religious bodies, with other groups similarly situated obtain as a by-product of organized society."
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> *McCollum* v. *Board of Education,* 333 U.S. 203, 249 (1948) (dissenting opinion).

Professor Robert F. Cushman well stated in his article:

> *Public Support of Religious Education in American Constitutional Law.* 45 Northwestern Univ. L. Rev. 333, 347 (1950):

> "Religion does and should, as part of the public, share in the benefits extended to the public in general. To hold otherwise is to adopt a position which would permit the state to make of religion an outlaw having no rights which the law is bound to protect."

There are numerous examples, at both the state and federal levels, of financial "aid" which religious bodies receive from government "as a by-product or organized society." A few such examples were summarized by Mr. Justice Douglas in *Engel* v. *Vitale,* 370 U.S. 421, 437 n. 1 (1962) (concurring opinion):

> "There are many 'aids' to religion in this country at all levels of government. To mention but a few at the federal level, one might begin by observing that the very First Congress which wrote the First Amendment provided for chaplains in both Houses and in the armed services. There is compulsory chapel at the service academies, and religious services are held in federal hospitals and prisons. The President issues religious proclamations. The Bible is used for the administration of oaths. N.Y.A. and W.P.A. funds were available to parochial schools during the depression. Veterans receiving money under the 'G.I.' Bill of 1944 could attend denominational schools, to which payments were made directly by the government. During World War II, federal money was contributed to denominational schools for the training of nurses. The benefits of the National School Lunch Act are available to students in private as well as public schools. The Hospital Survey and Construction Act of 1946 specifically made money available to non-public hospitals. The slogan 'In God We Trust' is used by the Treasury Department and Congress recently added God

> to the pledge of allegiance. There is Bible-reading in the schools of the District of Columbia, and religious instruction is given in the District's National Training School for Boys. Religious organizations are exempt from the federal income tax and are granted postal privileges. Up to defined limits — 15 per cent of the adjusted gross income of individuals and 5 per cent of the net income of corporations — contributions to religious organizations are deductible for federal income tax purposes. There are no limits to the deductibility of gifts and bequests to religious institutions made under the federal gift and estate tax laws. This list of federal 'aids' could easily be expanded, and of course there is a long list in each state". (Citation omitted).

See also

Bradfield v. *Roberts,* 175 U.S. 291 (1899).

where the Court upheld a direct appropriation made to a hospital operated under the auspices of the Roman Catholic Church, which, in fact, exercised "great and perhaps controlling influence over the management of the hospital." The most significant aspect of the *Bradfield* decision is the court's direct disavowal of the contention that religious institutions performing public functions cannot, consistently with the establishment clause be aided by government. The Court said (p. 297):

> "It is claimed that the allegation in the complainant's bill, that the said 'Providence Hospital is a private eleemosynary corporation, and that to the best of complainant's knowledge and belief, it is composed of members of a monastic order or sisterhood of the Roman Catholic Church, and is conducted under the

auspices of said church; that the title to its property is vested in the Sisters of Charity of Emmitsburg, Maryland,' renders the agreement void for the reason therein stated, which is that Congress has no power to make 'a law respecting a religious establishment' a phrase which is not synonymous with that used in the Constitution, which prohibits the passage of a law 'respecting an establishment of religion.' "

From an objective review of the relevant authorities, it can be seen that the often cited Jeffersonian "wall of separation" is not a rigid and mechanistic principle, but is, rather, the product of a judicious and pragmatic balancing of the legitimate interests of society in general and those of religion in particular. The geographic boundaries of this wall are to be determined by its functional aspect: to secure the strict neutrality of government toward religion for the mutual benefit of both. Its purpose is surely not to enforce an artificial and calamitous hostility. It is not helpful, therefore, to speak in absolutist terms. Such an approach obscures and hampers the very difficult quest for an enlightened resolution of highly complex questions, one of which is here presented. It is necessary at this point to proceed to an analysis of the practical operation and effect of the New York statute in terms of the relevant constitutional principles and authorities.

It is submitted that Section 701.3 of the New York Education Law, insofar as it provides for the lending of secular textbooks to all school children, does not constitute an establishment of religion within the meaning of the First Amendment.

It perhaps needs to be emphasized that the New York State Textbook Law provides "that only non-sectarian textbooks shall be provided by a Board." These words are cited from paragraph 6(a), opinion No. 181, issued on July

1966, by Mr. Brind, counsel to the New York State Education Department, which is set forth, at pages 4-A *et seq* of the appendix to appellants' brief. The opinion goes on to declare that there is a "responsibility on each board to make a determination that any textbooks which it provides are of a non-sectarian nature."

The completely secular nature of the textbooks to be made available under the New York law was emphasized in the statement of policy set forth in Chapter 320 of the Laws of 1965. That statement notes that there is "an insufficient proportion of our population educated in the fields of *science, mathematics, foreign languages and other nonsectarian subjects.*" (emphasis supplied)

It is clear therefore that the New York Textbook Loan Law's obvious purpose and primary effect is to facilitate the secular education of *all* New York school children. This is without question an area of clear and undisputed public concern. Such indirect and incidental benefits which might accrue to any religious institution as a result of the operation of this statute are no different in kind or degree than those expressly sanctioned by the Court in *Everson, supra,* where the services to be provided are "so separate and so indisputably marked off from the religious function." Moreover, it is felt that New York cannot reasonably effectuate the secular purpose which prompted this legislation without indirectly aiding religious interests in the manner specified and sanctioned in *Everson.*

The New York statute authorizes the lending of textbooks in secular subjects directly to an individual pupil, whose parents or guardian assumes responsibility for such texts. The analogy of a child drawing books from a public library is striking. No texts are furnished directly to any religious institution.

As the Court stated in

Chance v. *Mississippi State Textbook Bd.*, 190 Miss. 453, 469, 200 So. 706, 710 (1941),

upholding the Mississippi textbook statute:

> "If throughout the statute there are words which arrest the attention of oversensitized suspicion and are seen by a jaundiced eye as symptoms of secular [sic] control, one may regain composure by viewing the state's book depository as a great public library of books available to all, which sells any book to anybody, and which, subject to reasonable regulation, allows the free use thereof to any child in any school."

The following language of the *Chance* opinion is also relevant to the New York law:

> "The religion to which children of school age adhere is not subject to control by the state; but the children themselves are subject to its control. If the pupil may fulfill its duty to the state by attending a parochial school it is difficult to see why the state may not fulfill its duty to the pupil by encouraging it 'by all suitable means.' The state is under duty to ignore the child's creed, but not its need. It cannot control what one child may think, but it can and must do all it can to teach the child how to think. The state which allows the pupil to subscribe to any religious creed should not, because of his exercise of this right, proscribe him from benefits common to all." (at 711)

As previously demonstrated, the premise underlying both the *Cochran* and *Everson* decisions, *supra*, is what may be

termed a "child benefit" theory. It is the child, as a member of a particular class of persons similarly situated, who is the direct and actual benficiary of the particular public welfare legislation enacted by the State, and not a religious institution. *Everson* holds that where the benefit furnished to the child is separate and indisputably marked off from the religious function, the enactment will not be held to be unconstitutional merely because some indirect benefit accrues to a religious institution as a by-product of the legislation.

In *Everson*, the Supreme Court conceded that the provision to reimburse parents of parochial school students might render incidental benefits to those schools in that it undoubtedly helped the children to attend. The Court also recognized (p. 17) the "possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State." And are these not precisely the same type of incidental benefits against which the appellants here inveigh and with respect to which they urge that they be declared unconstitutional as an "establishment of religion"? It may well be granted that the New York textbook statute helps a pupil to pursue his secular education in a parocial school, which satisfies the compulsory education requirements of state law, and, further, that a possibility exists that some pupils might not be sent to such schools if their parents were compelled to pay the costs of providing their children's secular textbooks when these would be provided free up to the maximum of ten dollars. *Everson*, however did not strike down the New Jersey bus-fare legislation for such reasons; and, we submit, the contrary arguments are no more persuasive here than they were in that case.

It is conceivable, though not persuasive, to argue that

the holding in *Everson* should be restricted to the particular type of general welfare legislation there validated, that concerning the physical safety of the child. It is true that the New Jersey statute in *Everson* did involve considerations of physical safety and that other examples mentioned in the course of the opinion as proper state action, *i.e.*, police, fire and sewerage services, were concerned with public health and safety. However, it is extremely difficult to see why any constitutional distinction should be drawn between various types of legitimate public welfare legislation; between physical safety, on the one hand, and educational welfare, on the other. *Everson* itself makes no such express distinction. The relevant inquiry there is only whether the legislative purpose is secular and public. Moreover, in

School Dist. v. *Schempp, supra,*

the establishment clause test enunciated by the Court, we reiterate, concerns itself only with whether the legislative purpose is secular and whether its *primary* effect is to advance or inhibit religion (p. 222). There is no differentiation made or suggested as to the types of secular purposes which are permissible. It would be absurd to contend that education is any less a legitimate object of a State's concern for the welfare of its children, than is physical safety. As has been mentioned, even the dissenting justices in *Everson* were unable to distinguish between the payments for transportation there involved and payments for other educational costs, including textbooks. We submit, therefore, that the public welfare legislation here at issue differs only in type, but not in principle from that sanctioned in *Everson.*

It is further submitted that the incidental benefits to church-related schools complained of are a necessary result of the State's comprehensive plan to aid elementary and

secondary school education in New York. New York could not reasonably have attained its permissible secular purpose by means which would not indirectly aid religious interests in the manner indicated. This is so because a very substantial number of New York students presently attend non-public schools in that state. Certainly the comprehensive purpose and effect on education envisaged by the New York legislature would be significantly reduced were such a sizeable portion of the student population to be excluded from benefits for the sole reason that they attend church-related schools.

It is very nearly anomalous that the State of New York is permitted to identify, sanction and extensively regulated the secular educational function performed by church-related schools as satisfying its compulsory education standards for elementary and secondary school pupils, but is precluded from so doing where those very standards are at issue. Certainly the State has been perceptive enough to separate the educational and religious aspects of church-related schools.

Moreover, a reversal of the decision of the Court of Appeals would cast serious doubt on New York's future participation in federal programs presently rendering aid to students attending church-related schools as part of a comprehensive effort to secure uniformly high educational standards. At this juncture, it is beyond question that the federal government holds educational excellence to be a national goal and has instituted various programs to provide benefits to students attending church-related schools. In particular, the *Elementary and Secondary Education Act of 1965*, Title II, § 201, 20 U.S.C.A. §§ 821-27 (Cum. Supp. 1965), authorizes the appropriation of funds for the purpose of making grants "for the acquisition of school library resources, textbooks, and other printed and published instructional materials for the use of children and teachers in public and private elementary and secondary

schools." The Act expressly provides for exclusive State selection and control of furnished materials and for public administration of the program. Similarly, Title II, § 205 of the Act, 20 U.S.C.A. § 241e (Cum. Supp. 1965), authorizes grants to local educational agencies for the purpose, among others, of providing educationally deprived children of low income families, who attend private elementary and secondary schools, with special educational services and arrangements, including textbooks.

A reversal of the decision of the Court of Appeals in this case would mean that New York state,—and presumably all other states, — would have to ask, when providing a benefit to school children, "What school do you attend?" If the answer is "parochial," that child must be denied the benefit accorded to all other students. This may raise serious questions under the free exercise clause of the First Amendment. See

> *Sherbert* v. *Verner,* 374 U.S. 398, 404, 410 (1963);
> *Thorpe* v. *Housing Authority,* 385 U.S. 670, 678-79 (1967) (concurring opinion)

Is a legislature thus to be prevented from enacting a comprehensive plan to raise general educational standards among all school children in a State?

It has long been established that parents have a constitutionally protected right to discharge their duty under state compulsory education laws by sending their children to religious rather than public schools, provided the school meets the secular educational requirements which the State properly may impose.

> *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1924).

See also

> *Griswold* v. *Connecticut,* 381 U.S. 479, 482 (1965).

If the decision of the Court of Appeals is reversed, however, an exercise of this constitutional right results in a forfeiture of the general public welfare benefits which would otherwise accrue. See *Thorpe* v. *Housing Authority*, supra at pp. 678-79. We submit that not only is this not a fair or prudent result, but one that is in no way required by the principle of neutrality established in *Everson*. For the foregoing reasons, we urge that the holding of the Court of Appeals that the New York textbook statute does not violate any clause of the federal Constitution, including the establishment clause of the First Amendment, be affirmed.

Respectfully submitted,

HERBERT F. DESIMONE,
Attorney General
of Rhode Island
CHARLES G. EDWARDS,
Assistant Attorney General

WILLIAM C. SENNETT,
Attorney General
of Pennsylvania
JAMES L. OAKES,
Attorney General
of Vermont

SUPREME COURT, U. S.

MAR 2[illegible] 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 660

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACK, SAND LAKE and NORTH GREENBUSH, RENSSELAER COUNTY and CHATHAM, COLUMBIA COUNTY and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3, TOWNS OF NORTH HEMPSTEAD and OYSTER BAY, NASSAU COUNTY, NEW YORK,
Plaintiffs-Appellants,

against

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York, *Defendant-Respondent,*

and

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH and BARBARA BRENNAN, *Intervenor-Defendants-Respondents.*

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

Motion For Leave to File Brief Amicus Curiae of the Attorney General on Behalf of the State of New Mexico, and Brief Amicus Curiae

BOSTON E. WITT
Attorney General

MYLES E. FLINT
Assistant Attorney General

Attorneys for New Mexico

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IN THE

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ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE ATTORNEY GENERAL ON BEHALF OF THE STATE OF NEW MEXICO

The Attorney General of The State of New Mexico respectfully moves for leave to file a brief *amicus curiae.* In support of such motion, he states as follows:

I.

The primary issue involved in this cause concerns the validity of a New York Law authorizing the purchase and distribution by appropriate state officials of textbooks to persons enrolled in private schools. Education Law, § 701(2), New York Laws 1965, Ch. 320. This law is challenged as being contrary to the First and Fourteenth Amendments of the United States Constitution.

II.

The State of New Mexico pursuant to Section 77-13-7, N.M.S.A., 1953 Compilation (P.S.) provides free instructional material to students enrolled in public and private schools in a manner similar to that followed by the New York Law now under attack.

III.

There are currently 18,139 students enrolled in private institutions in the State of New Mexico who receive free instructional materials or approximately six percent of the 286,706 enrolled in schools in the state after the first twenty days of the current academic year began.

IV.

The outcome of the current case could have far reaching effects upon the schools and children of this state and the state therefore is directly and vitally concerned by the attack upon the New York law.

V.

The Appellants in their jurisdictional statement cite the case of *Zellers* v. *Huff*, 55 N.M. 501, 236 P. 2d 949

(1951) and state that this case held that the New Mexico textbook law was unconstitutional and if this position is left unchallenged, it too could have far reaching effects upon the schools and children of this state.

WHEREFORE, for the foregoing reasons, the Attorney General on behalf of the State of New Mexico moves for leave to file a brief *amicus curiae* in this cause, and for all other proper relief in the premises.

Respectfully submitted,

/s/ BOSTON E. WITT
Boston E. Witt
Attorney General

/s/ MYLES E. FLINT
Myles E. Flint
Assistant Attorney General

Attorneys for New Mexico

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Plaintiffs-Appellants,

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BRIEF AMICUS CURIAE OF THE ATTORNEY GENERAL OF NEW MEXICO

INTEREST OF AMICUS CURIAE

The interest of the amicus curiae is set forth in motion to which this brief is attached. The Opinions Below, Jurisdiction and Statement are set forth in Appellant's Jurisdictional Statement and will not be duplicated here.

QUESTION INVOLVED

Does a statute providing for the loan of textbooks to pupils in both public and non-public schools violate any provisions of the First Amendment to the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

Education Law, Section 701 (2), as amended by New York Laws 1965, Chapter 320:

> "In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, textbooks. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities."

POINT I

A statutory provision for the loan of textbooks to pupils of both public and non-public schools does not violate the provisions of the United States Constitution

It is Appellant's position that the furnishing of textbooks to pupils in both public and private schools violates the First Amendment of the United States con-

stitution in that it involves the use of tax moneys in aid of sectarian schools and constitutes the establishment of religion as that term is used in the First Amendment. We would submit that to the contrary such an act does not violate the provisions of the Constitution. It is neither the use of public moneys in aid of sectarian schools nor does it constitute the establishment of religion or tend to prevent the free exercise of religion as set forth in the First Amendment.

In support of our position we cite the court to *Everson* v. *Board of Education,* 330 U.S. 1. (1947). That case involved the question whether reimbursement to parents of money expended by them for the bus transportation of their children to parochial schools was contrary to the provisions of the First Amendment of the United States Constitution. In its decision this court concluded that such a payment was not unconstitutional. In reaching its conclusion the court gave two basic reasons for its decision. First it stated that a state has the power to promulgate acts for the general well being of the public. In such cases the Supreme Court is hesitant to overrule the actions of the state legislature. After a consideration of the bus transportation law in question, the court concluded that this was a legitimate public purpose with a benefit to the community and that, therefore, it caused no problems constitutionally.

The court then proceeded to a discussion of the meaning "establishment of religion" as that term is used within the Constitution. There the court concluded that it at least was intended to create a wall of separation between church and state. Having reached that conclusion it then examined the effect of reimburse-

ment for bus transportation in that light. It was stated that such payment for bus transportation *would indirectly assist* students to church schools but in interpreting the act of the New Jersey Legislature the court had to be careful not to inadvertently prohibit New Jersey from extending its general state law benefits to all of its citizens without regard to their religious belief. It was stated that the role of the state with regard to religion must be neutral and not adversarial. The court then held that payment for such transportation did not violate the provisions of the Constitution because this did not involve state aid to parochial schools but was a general program to assist the parent and pupil without regard to religion. In other words, it would seem that if the purpose of the law is secular and any benefit to religion is only incidental the law would not be unconstitutional.

It is our belief that if the pupil textbook law as enacted in New York is construed or examined in the light of the pronouncements contained in the *Everson* case, *supra*, it is clear that this law is valid for the same reason that the bus transportation law under consideration in *Everson, supra,* was held valid.

The question is whether a textbook law which provides that governing bodies of various school districts may purchase and loan textbooks to all children residing in the district whether they are enrolled in public or private schools is an act which is for the *general public welfare.* In most states, laws have been enacted which require compulsory attendance at school for children up to certain ages. Undoubtedly the purpose of the compulsory attendance law is to insure that all children will receive an education on the theory that the

education of these children will be for the general public welfare of the community as well as for the benefit of the individual child. Most states further have laws which recognize that this education which is held to be a desirable goal may be attained in either public or private institutions. From this it is not difficult to conclude that the education of the child whether it be in public or private school is a desirable public goal.

Furthermore, it should be noted that the laws with regard to compulsory attendance of schools are applicable to all children. There is no attempt to distinguish under such laws between those students who attend public schools and those students who attend private schools. Certainly there is no distinction drawn between the students on religious grounds as each child's education is of great public importance as that of another.

The textbook law under consideration provides for free textbooks to all students living within the districts who attend schools which have been accredited by the proper authority has the same general purpose as the compulsory school attendance law. The purpose of the compulsory school law is to require a minimum level of education of all children within the state. By establishing methods of the accreditation of schools the legislators recognized the need for standards beyond simple school attendance to insure that the ultimate goal of education of the child is obtained. The school textbook law is merely an extension of the same concept. By establishing recognized textbooks and making them available to all students whether attending public or private schools the state is indicating and

taking action commensurate with its interest that all students should be required to attend recognized schools wherein they receive a basic level education. The benefits to be derived from the implementation of the textbook law is twofold. The general public receives a benefit in that the general level of education within the system will improve pursuant to the implementation of the act. The individual child will benefit from the textbook law in that he or she will have at his disposal the best available material from which to continue his education.

It is true that schools may indirectly be benefited by the use of free textbooks. But, as was stated in *Everson*, this is not contrary to the Constitution. The purpose of the law is secular. The benefit to be derived directly from the law inures to the child or student. The only benefit to the school is indirect. Applying the test as announced in *Everson*, that the textbook law involved here has a benefit to the general public and to the pupil, who is the recipient of the textbooks, that the state program is secular in purpose and the benefit to the school is only incidental and indirect, we conclude that the law does not violate the provisions of the First Amendment of the United States Constitution.

In New Mexico under Section 77-13-7; N.M.S.A., 1953 Compilation (1967 P.S.) any student attending a school approved by the State Board of Education pursuant to the compulsory school attendance law whether it be public or private is entitled to free use of instructional materials. As in New York the beneficiary of the enactment is the child and the child is chosen without regard to religion or comment thereon. The law provides that the loan is to the student and not to the

school. Any child attending a school that meets the minimum requirements established by the State Board of Education is entitled to these materials. It is our contention that the law in New Mexico is valid for the same reasons as set forth above for upholding the validity of the New York law. Clearly in New Mexico where six per cent of the total school population or 18,139 students as of the beginning of the 1967-68 school year attend private schools, the importance of the programs permitted under the school textbook law are of great magnitude. The general benefits accruing to the populace of this state are manifold. New Mexico has large areas where the population is poor, the level of education among the population is low and large scale unemployment exists. Laws, such as the free textbook law, are directed towards improving the picture in these places. It is unquestionably valid to state that one method of improving the lot of these persons is through education. To hold laws such as these invalid will certainly make it extremely difficult to carry forward programs of great public interest.

It is our understanding that in the jurisdictional statement filed by Appellants, it is alleged that the question presented to the court in this cause has been considered by the Supreme Court of the State of New Mexico and a conclusion has been reached that a statute providing for textbooks for students has been held to be unconstitutional. We would respectfully point out that the present school textbook law in the State of New Mexico was enacted in 1967 and that there has been no litigation over this particular enactment. *Zellers* v. *Huff*, 55 N.M. 501, 236 P. 2d 949 (1951) did comment on a related question. However, it should be made clear that the question presented in that cause

concerned a different legislative enactment which provided free textbooks for both public and private schools. That law has been repealed.

CONCLUSION

In conclusion, we respectfully submit that the New York law involved should be found constitutional and the decision of the Court below affirmed.

Respectfully submitted,

BOSTON E. WITT
Attorney General

MYLES E. FLINT
Assistant Attorney General

Attorneys for Amicus Curiae, New Mexico

SUPREME COURT, U. S.

MAR 29 1968

JOHN F. DAVIS, CLERK

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Appellants,

—v.—

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York,

Appellee,

—and—

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH, and BARBARA BRENNAN,

Intervenor-Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF THE LONG ISLAND CONFERENCE OF RELIGIOUS ELEMENTARY AND SECONDARY SCHOOL ADMINISTRATORS (LICRESSA), *AMICI CURIAE* IN SUPPORT OF APPELLEE AND INTERVENOR-APPELLEES

THOMAS J. FORD,
HAHN, HAHN & FORD
Attorneys for Amici Curiae
105 Hillside Avenue
Williston Park, N. Y. 11596

EDWARD J. WALSH, JR.
GEORGE S. EATON
DANIEL P. SULLIVAN
of Counsel

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Interest of the *Amici Curiae*

The Long Island Conference of Religious Elementary and Secondary School Administrators (LICRESSA), the *amici curiae* submitting this brief, are the chief administrators of voluntary, non-profit, full time, accredited, religious elementary and secondary schools in Long Island offering State approved curricula. The Conference is composed of the Lutheran High School Association, the Hebrew Day Schools, the Episcopal Schools, Diocese of Long Island, and the Education Department of the Roman Catholic Diocese of Rockville Centre. It is believed to be the first organization of its type in the nation. Its accredited religious elementary and secondary schools have a combined enrollment in excess of 100,000 children, who attend these schools under New York's compulsory education law.

The prime purpose of the Conference is that its members may meet, plan and work cooperatively with each other and with public educators in the common interest of furthering excellence in education for all children. The spirit of the Conference is reflected in its cooperation with public educators in educational and community problems of common concern. The Conference has pioneered in advancing inter-faith understanding and is living proof that religiously affiliated education is not a divisive force in our society but can be a major force in producing inter-religious harmony.

The Conference is particularly interested in the instant case because this appeal questions the right of approximately one-half million New York children in religiously

oriented independent elementary and secondary schools to share in the benefits of the State Textbook Loan Law. Appellants really seek a decision by this Court that Conference schools are somehow not schools at all, but churches. As educators we are doing the same educational job as public school educators. In addition, we find a place in our curricula and time in our school day for religious training. This hardly transforms our schools into churches.

All New York children must attend a public or accredited private school under the State's Compulsory Education Law. The school commands the greatest part of the child's day and learning time. When we add religious training to the school curricula, we do not thereby constitutionally taint our whole educational fabric. We simply provide a necessary supplement to educate the whole child.

New York school children—in both public and private schools—take a common examination for New York State Regents' Scholarships. There are no religious questions asked on these examinations. They test secular knowledge only, yet our children do well and earn their proportionate share of Regents' Scholarships. We like to feel that this is a result of the quality of the secular educational job we are doing.

This case is of far reaching importance not only to children in religiously oriented independent schools and their parents, but to citizens everywhere interested in improving the quality of education of all children as the welfare of the State and Nation requires. Reasonable state measures, within the limits of the Constitution, to assist

school children, including those in religiously oriented schools, should be favored.

Prior to enactment of the statute challenged here public school authorities were not required to purchase or loan textbooks to their pupils. On many occasions parents of children in New York public schools found themselves in difficulty because they had failed to provide textbooks for their children. There has never been any obligation on the part of a private or independent school, religiously affiliated or otherwise, to furnish textbooks. Since neither public nor private schools were under any mandate to furnish textbooks, the amendment of the statute to provide for the free loan of textbooks to all children actually provided no aid to either public or private schools. The aid provided by the amendment was clearly for the children and, of course, their parents who would otherwise have been required to purchase the textbooks.

Students now in public schools and in secular private schools, regardless of wealth, are granted the free loan of textbooks. Appellants insist that children enrolled in our Conference schools be singled out solely because of such enrollment and denied the free loan of a public school approved textbook. When this is done, clearly an unwarranted religious test has been imposed to condition the grant of a public benefit.

We firmly believe that the New York Textbook Loan Law does not constitute an establishment of religion but is a proper exercise of State concern in educational matters.

For these reasons we have obtained the written consent of all parties to this case to file a brief *amici curiae* herein in support of the constitutionality of the New York Text-

book Loan Law and pursuant to such consent we have directed counsel to prepare and file this brief.

Summary of Argument

Establishment determines this case.

If no Establishment be found then appellants' Free Exercise claims are baseless. Appellants concede as much (BR 27, 28).

The specific problem posed by the case at bar is whether secular textbooks cease to be secular simply because they are read and used in a school that also teaches about God. Appellants' test in effect would impose a Constitutional Quarantine on accredited schools that are religiously affiliated. Nothing in the First Amendment requires such hostility to religion. There is no Jewish multiplication table. There is no Protestant alphabet. There is no Catholic law of gravity. The books that teach these and other secular subjects do not become religious books merely because of the location of their use. It would appear to be a novel doctrine, to say the least, if the site of the use of a textbook became the determinative constitutional element.

Appellants find no evidence in the record of benefit to any schools or of any abuse of the New York Textbook Loan Law. They base their attack solely on a type of "transitory unconstitutionality"—a sort of "guilt by association"—that places the religiously oriented school legally "off-limits." There is no more to their position than that; for there is no constitutional infirmity in the children who are the recipients of the textbook loan; nor in the textbooks themselves, the contents of which remain

unchanged; nor in the use to which they are put—to acquire knowledge of the secular subjects mandated by State curricular requirements. Appellants' argument is that as a secular textbook is carried up the steps and into a Hebrew day school—a substantial change in its essence occurs—and somehow it becomes a religious tract. We assume the principle would apply in like manner to the transport of a book obtained on loan from a public library to a parochial school classroom or, let us assume a pupil enrolls in a public or private secular school and requests and receives the free loan of secular textbooks. Then, the day before the school year commences let us say he transfers his enrollment to a parochial school which accepts the same textbooks. Appellants' theory would mandate that this transition requires the surrender of the textbooks to which the student was otherwise entitled the previous day. In apparent recognition of the basic weakness in this approach, appellants pose hypothetical situations wherein abuses of the legislative purpose may occur. On such grounds most statutes could not survive constitutional scrutiny.

There is nothing in the doctrine of neutrality required of the State in the area of First Amendment freedoms which prevents accommodation to the religious needs of our people. Indeed the contrary may be true when freedom of speech and religion are involved as pointed out by Mr. Justice Goldberg in *Abington* v. *Schempp*.

> "It is said, and I agree, that the attitude of the State toward religion must be one of neutrality. But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that non-interference and non-in-

volvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive or even active hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it."

Abington School District v. *Schempp* and *Murray* v. *Curlett,* 374 U.S. 203, 306.

Mr. Justice Harlan, Justice White concurring, voiced a similar thought dissenting in *Sherbert* v. *Verner* decided the same day as *Schempp*:

"The constitutional obligation of neutrality (citing Schempp) is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation. There are too many instances in which no such course can be charted, too many areas in which the pervasive activities of the State justify some special provision for religion to prevent it from being submerged by an all embracing secularism."

Sherbert v. *Verner,* 374 U.S. 398, 422.

Appellants' view of permeation raises this interesting question:

If our Conference schools are held to be so permeated with religion that they are more churches than schools then should not the monies parents expend to support them be properly deemed church contributions, fully deductible on their income tax returns?

Obviously a line must be drawn somewhere. We say let it be drawn in a way which accords the fullest freedom of action to the sovereign State of New York in the discharge

of its interest and obligation, *parens patriae,* in the care and education of all of its children. The Statute is entitled to the presumption of constitutionality with which all such legislation is favored. It should not be invalidated on constitutional grounds unless its infirmities are unmistakable and not, as here, hidden in hypotheses and assumptions based upon extreme theories of separationism.

The right to be free in thought and belief, the right to equal protection of the laws and to share in the benefits of a public welfare Statute are personal rights. They do not inhere in schools, churches, synagogues or institutions. Here, as in the racial desegregation cases, it is the individual child who is entitled to be treated equally before the law. Children are compelled under the Compulsory Education Law of the State to attend accredited schools. There should be no religious test on a child's right to receive the loan of a public school textbook to aid him in acquiring knowledge of a secular subject mandated by State directed curricula.

ARGUMENT

POINT I

The inclusion of religious instructions in its curricula does not transform a school discharging the primary function of providing a state approved and state mandated education into a church.

The preamble declaring the Legislature's purposes in enacting the amendment to Section 701 of the New York Education Law to provide for the free loan of textbooks, states:

> "Section 1. Statement of policy. The security and welfare of the nation require the fullest development of the mental resources and skills of its youth. This calls for more adequate educational opportunities and increased efforts to educate more of the talent of our nation and requiring the correction of those imbalances in our educational programs which have led to an insufficient proportion of our population educated in the fields of science, mathematics, foreign languages and other non-sectarian subjects. The Congress of the United States has reaffirmed the principle that the states and local communities retain primary responsibility for public education. It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state." N.Y. Sess. Laws 1965, Ch. 320, #1.

The education of its citizens is the legitimate concern of the State and the State has the right to lend its aid to all its citizens who attend schools which satisfy the State's

educational requirements. *Pierce* v. *Society of Sisters*, 268 U.S. 510. It is the legislative purpose and the primary effect of programs supported by public funds that is controlling. If the funds are used to benefit the State and the student in the accomplishment of lawful State objectives, the use is constitutionally proper and any incidental effect which happens to coincide or harmonize with the aims of any or all religions is not an aid to religion or the financing of a religious group, or support of the religious function in the constitutional sense. To say that the State cannot provide for the free loan of a public school approved secular textbook to a child attending a State accredited school solely because that child is enrolled in a religiously affiliated school would result in a constitutional interpretation of hostility to religion, rather than one of mere separation of church and state.

Appellants assert "there is no such thing as secular education in a sectarian school because the whole curriculum is permeated by religion" (Br. 7). Aside from the fact that this is an unproved assumption, every school is permeated with a "religion,"—at least in the sense of value-inculcation.

In 1962 the Disciplines Seminar of the National Education Association published a booklet entitled *The Scholars Look At The Schools*. The broad definition of religion used in this publication is identical with the one employed by this Court in *Torcaso* v. *Watkins*, 367 US 488. On page 18 one reads the following in *The Scholars Look At The Schools*:

> "Religion, in this sense, is defined as that which is one's 'ultimate concern,' to use Paul Tillich's phrase, or, according to Enrich Fromm, that which is one's 'life orientation.' The teaching of a religious attitude, from

this standpoint, is inescapable in any school. There is no teacher, no school which can escape the problem of life orientation, the ultimate commitments by which every person must live. Every analysis of life and culture must take account, either implicitly or explicitly, of those fundamental commitments which underlie every human action. This is precisely the domain of religion. Democracy, communism, and the various economic systems cannot be analyzed in their most profound dimensions without getting into the question of ultimate values. This is, finally, a religious question.

Thus, we teach religion in the schools, whether we would or not."

To the same effect is this statement:

"Commitments, or values, are both taught and caught. They are everlastingly expressed and implied in the child's environment—in school and out. They literally permeate the public school." ("Religion in the Public Schools" published by the American Association of School Administrators, 1964, p. 63.)

The plain fact is that a school is a school and not a church when it is providing, as a primary function, a State mandated general education. Religious permeation, as appellants describe it, whether in public or non-public schools, is constitutionally irrelevant in such event.

POINT II

The New York Textbook Loan Law does not violate the Establishment Clause of the First Amendment.

The Textbook Loan Law furthers the public welfare by providing for the free loan of public school approved secular textbooks to all seventh to twelfth grade children in the State to improve the quality of secular education.

Section 1 of the Statute, here under attack, provides in part:

> "It is hereby declared to be the public policy of the State that the public welfare and safety require that the State and local communities give assistance to educational programs which are important to our national defense, and the general welfare of the state" (A. 63).

Since the purpose and effect of the Statute appear proper and within the power of the legislature to achieve, our scrutiny must then be directed to the means set forth in the Statute to gain these objectives in order to determine whether the enactment violates the Establishment Clause of the First Amendment.

The means are composed of several elements as follows:

(a) Textbooks are to be purchased with public funds with ownership remaining in the public school district.

(b) The textbooks are to be strictly non-sectarian and only those designated or approved by public education authorities.

(c) Textbooks are to be loaned to students on individual request.

What is the effect produced thereby?

The student benefits by receiving an aid to education in State approved subjects. The State benefits thereby because the "imbalances in our educational programs" regarding such subjects is alleviated.

But what of the schools themselves: are they aided in a manner which violates the First Amendment?

It is quite clear that there is no direct benefit, or aid to the schools under this program. The record before this Court is bare of a scintilla of evidence of even any indirect aid or benefit to the schools. Indeed, there is opposing evidence that in the past all of the intervening parents (and others similarly situated) purchased at their own expense, the textbooks which their children had been using (A. 13-15). They, and their children, are the only beneficiaries, directly or indirectly, of the provisions of the Textbook Loan Law. The speculations of appellants to the contrary in this regard (BR 7) are wholly unsupported.

In view of the clear language and effect of the Textbook Statute the Court below held that it did not violate the provisions of Article XI, Section 3, of the New York State Constitution, commonly known as the Blaine Amendment, which has long been considered to be more restrictive in its provisions than the Federal First Amendment (A. 65).

This Court has interpreted the No Establishment Clause with respect to government aid to religion in:

Bradfield v. *Roberts*, 175 US 291;
Cantwell v. *Connecticut*, 310 US 296;
Everson v. *Board of Education*, 330 US 1;
McCollum v. *Board of Education*, 333 US 203;

Zorach v. *Clauson*, 343 US 306;
McGowan v. *Maryland*, 366 US 420;
Engel v. *Vitale*, 370 US 421;
Abington School District v. *Schempp*, 374 US 203.

We assume that the relevant principles of these cases will be reviewed fully in the main briefs and we shall only comment briefly on them here. They hold that the Establishment Clause means at least the following:

Religious institutions performing a public function can be aided by government. *Bradfield* v. *Roberts*.

The provisions of the Establishment Clause are applicable to the states by the Fourteenth Amendment. *Cantwell* v. *Connecticut*.

Public services and social benefits "indisputably marked off from the religious function" may be provided by government to pupils in attendance at religiously oriented schools. *Everson* v. *Board of Education*.

The conduct of sectarian indoctrination on public school premises under supervision of public school authorities violates the Establishment Clause. *McCollum* v. *Board of Education*.

The First Amendment does not forbid all cooperation between religion and State. A program of public school released time sectarian education is a permissible accommodation to the spiritual needs of our people. *Zorach* v. *Clauson*.

Statutes whose reason or effect merely happen to coincide or harmonize with the tenets of some or all religions

do not violate the Establishment Clause. *McGowan* v. *Maryland.*

Prayers and religious services in public schools are banned. *Engel* v. *Vitale.*

To withstand the strictures of the No Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. *Abington School District* v. *Schempp.*

That the instant case meets the *Abington* test is recognized by Mr. Justice Staley, Jr., in his decision in the Court below (27 AD 2d, 69, 80; A. 59-60):

> "Chapter 320 does not involve affirmation by the state of religious beliefs, nor religious activities within the public schools. The Statute is completely neutral with respect to religion, since it merely makes available secular textbooks to requesting students, regardless of the schools they attend. It completely meets the test for constitutionality under the First Amendment as stated by the United States Supreme Court in Abington School District v. Schempp, 374 US 203, 222."

While *Cochran* v. *Louisiana Board of Education,* 281 U.S. 370, did not involve an interpretation of the Establishment Clause it is similar in its facts to the case at bar. It concerned a Louisiana statute providing for State supply of secular textbooks to children attending religiously oriented schools.

In clearly distinguishing the public aspect of parochial education from its private or religious aspect, the Court held that whatever benefit might accrue to the school or institution from the aid given, was incidental to the public

benefit to the pupil and the State and was, therefore, constitutionally without significance. Chief Justice Hughes wrote the opinion for a unanimous Court. In affirming the holding of the Louisiana Supreme Court he quoted a portion of that Court's opinion as follows:

> "The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or nonsectarian, and that the books are to be furnished to them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children of the state, alone are beneficiaries." *Id.* at pp. 374-375.

Earlier in this brief, we examined the provisions of the Textbook Loan Law and demonstrated that:

1. The purpose of the Statute is to "correct imbalances in our educational programs" by increasing education in State approved subjects. (Statement of Legislative policy, *supra.*)

2. The primary effect is to further the public welfare and safety by increasing the educational opportunities to the youth of the State thereby increasing intellectual skills and resources which are important to the national defense and the general welfare of the State.

As stated in *Cochran,* the statute does not isolate parochial school pupils as its beneficiaries. Its interest is edu-

cation, broadly; its methods comprehensive. Individual interests are aided only as the common interest is safeguarded. 281 US 370, 375.

The total aim and effect of the statute is to improve the education of all children in secular subjects. It neither advances nor inhibits religion and is thus in accord with the neutrality required of the State in the balance of power between individual, Church and State struck by the First Amendment. *Zorach* v. *Clauson,* 303 NY 161, aff'd 343 US 306.

Whenever it is contended that a certain State act, such as the Statute questioned herein, is in aid of the establishment of religion, the obverse side of the coin must perforce be examined, lest in striking down the proposed act the right to freedom of religion be destroyed. *64th Street Residences, Inc.* v. *New York,* 10 Misc. 2d 841, 173 NYS 2d 700, aff'd 5 AD 2d 824, 170 NYS 2d 993, aff'd 4 NY 2d 268, cert. den. sub nom., *Harris* v. *City of New York,* 357 US 907 (1958).

Everson v. *Board of Education* (*supra*) expressed the determination of this Court not to "inadvertently prohibit New Jersey from extending its general State law benefits to all its citizens without regard to their religious beliefs."

This holding, we submit, gives full effect to both parts of the religious clauses of the First Amendment and emphasizes the ultimate value to be protected—*Religious Liberty.*

CONCLUSION

The judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted,

THOMAS J. FORD
HAHN, HAHN & FORD
Attorneys for Amici Curiae
105 Hillside Avenue
Williston Park, N.Y. 11596

EDWARD J. WALSH, JR.
GEORGE S. EATON
DANIEL P. SULLIVAN
Of Counsel

APPENDIX A

Section 701, New York Education Law, as amended by Chapter 320 of the Laws of 1965 and Chapter 796 of the Laws of 1966 (effective September 1, 1966):

§ 701. Power to designate text-books; purchase and loan of text-books; purchase of supplies

1. In the several cities and school districts of the state, boards of education, trustees or such body or officer as perform the functions of such boards, shall designate text-books to be used in the schools under their charge.

2. A text-book, for the purposes of this section shall mean a book which a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends.

3. In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities. Such text-books are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board

of regents and such boards of education, trustees or other school authorities.

4. No school district shall, during the school year nineteen hundred sixty-six–sixty-seven, the school year nineteen hundred sixty-seven–sixty-eight or the school year nineteen hundred sixty-eight–sixty-nine be required to purchase or otherwise acquire textbooks, pursuant to this section, the cost of which shall exceed an amount equal to fifteen dollars multiplied by the number of children residing in such district who on the first day of October, of such school year are enrolled in grades seven through twelve of a public or private school which complies with the compulsory education law, or in any subsequent school year be required to purchase or otherwise acquire textbooks, the cost of which shall exceed an amount equal to ten dollars multiplied by the number of children residing in such district and so enrolled on the first day of October of such subsequent school year; and no school district shall be required to loan textbooks in excess of the textbooks owned or acquired by such district; provided, however that all textbooks owned or acquired by such district shall be loaned to children residing in the district and so enrolled in grades seven through twelve in public and private schools on an equitable basis.

5. In the several cities and school districts of the state, boards of education, trustees or other school authorities may purchase supplies and either rent, sell or loan the same to the pupils attending the public schools in such cities and school districts upon such terms and under such rules and regulations as may be prescribed by such boards of education, trustees or other school authorities.

6. The commissioner of education, in addition to the annual apportionment of public monies pursuant to article seventy-three of this chapter, shall apportion to each school district an amount equal to the cost of the text-books purchased and loaned by the district pursuant to this section, but in no case shall the aid apportioned to the district be in excess of the following amounts: a. on account of expenditures made during the school year nineteen hundred sixty-six–sixty-seven the school year nineteen hundred sixty-seven–sixty-eight or the school year nineteen hundred sixty-eight–sixty-nine an average of fifteen dollars per pupil residing in the district and enrolled in grades seven through twelve, and

b. on account of expenditures made in any subsequent school year an average of ten dollars per pupil residing in the district and enrolled in grades seven through twelve.

7. The apportionment provided for in this section shall be paid, at such times as may be determined by the commissioner and approved by the director of the budget, during the school year in which the expenditures are made to the extent that such expenditures have been made and reported to the department prior to such apportionment. Expenditures by a school district in excess of the average of fifteen dollars per pupil in the school year nineteen hundred sixty-six–sixty-seven, the school year nineteen hundred sixty-seven–sixty-eight or the school year nineteen hundred sixty-eight–sixty-nine or in excess of ten dollars per pupil in any subsequent school year shall be deemed approved operating expense of the district for the purpose of computation of state aid pursuant to subdivision five of section thirty-six hundred two of the chapter, but expenditures up to such average of fifteen dollars or ten dollars above mentioned shall not be deemed approved operating expenses for such purpose.

SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 660

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACH, SAND LAKE AND NORTH GREENBUSH, RENSSELAER COUNTY AND CHATHAM, COLUMBIA COUNTY AND BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3, TOWNS OF NORTH HEMPSTEAD AND OYSTER BAY, NASSAU COUNTY, NEW YORK,
Appellants,

v.

JAMES E. ALLEN, JR.,
as Commissioner of Education of the State of New York,
Appellee,

and

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH and BARBARA BRENNAN,
Intervenor-Appellees.

Appeal from the Court of Appeals of the State of New York

BRIEF OF NATIONAL ASSOCIATION OF INDEPENDENT SCHOOLS, INC., *AMICUS CURIAE*

ETHAN A. HITCHCOCK
1 Rockefeller Plaza
New York, N. Y. 10020

WEBSTER SHEFFIELD FLEISCHMANN
HITCHCOCK & BROOKFIELD
1 Rockefeller Plaza
New York, N. Y. 10020

I. N. P. STOKES
MAXIMILIAN W. KEMPNER
Of Counsel

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Intervenor-Appellees.

Appeal from the Court of Appeals of the State of New York

BRIEF OF NATIONAL ASSOCIATION OF INDEPENDENT SCHOOLS, INC., *AMICUS CURIAE*

Interest of the *Amicus*

This brief is submitted with the consent of counsel for the parties in behalf of the National Association of Inde-

pendent Schools, Inc. ("the Association"), a Massachusetts corporation.

The Association's membership comprises approximately 690 independent schools engaged in primary and secondary education in 42 states of the United States. Its membership also includes 23 regional school associations and 14 other associations of teachers, alumni and scholarship groups connected with independent schools. One hundred and nine independent schools in the State of New York are Association members.

The stated purposes of the Association are

> "to assist, strengthen, and promote the interests of independent schools of the United States * * * to aid them to serve effectively the free society from which they derive their independence." National Association of Independent Schools, Inc., By-Laws, Art. II.

Members of the Association include schools which in general terms may be categorized as either (a) having no direct relationship of any kind with a religious group but may include in their program some form of religious observance varying in nature and degree from school to school; or (b) closely related to or controlled by a religious group. The latter group would be in the minority.

The Association files this brief because it believes that the Constitution permits state aid to private education where the legislative purpose is secular and the primary effect is to carry out the legitimate state purpose of aiding education. Should this Court fail to establish such criteria firmly, and as the controlling doctrine in this case, the private school will be prevented from contributing its full potential to the free society from which it derives its independence.

Statement of the Case

Two school districts in the State of New York challenged the constitutionality of a statute enacted by the New York State Legislature in 1965, and amended in 1966, providing for State financing of the purchase of textbooks, to be loaned to children attending both public and private schools. The statute provides in essential part:

> "In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities. Such text-books are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities." N.Y. EDUCATION LAW §701.3 (McKinney 1967.)

The legislative purpose is stated in the first section of the statute, which reads in part as follows:

> "* * * It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense, and the general welfare of the state." New York Laws of 1965, ch. 320, §1.

The appellants herein brought suit in the Supreme Court of the State of New York, Albany County, asserting that

compliance with the statute would violate both the State and Federal Constitutions. The Supreme Court of the State of New York upheld their contentions. 51 Misc. 2d 297, 273 N.Y.S. 2d 239 (A. 29). The Appellate Division of the Supreme Court reversed, dismissing the complaint on grounds of lack of capacity to sue, but all five justices concurred in the view that the statute in question did not violate either the State or the Federal Constitution. 27 A.D. 2d 69, 276 N.Y.S. 2d 234 (A. 45). The Court of Appeals, by a vote of four to three, affirmed the judgment of the Appellate Division, and upheld the constitutionality of the statute under both the State and Federal Constitutions. 20 N.Y. 2d 109, 281 N.Y.S. 2d 799 (A. 63). It is constitutionality under the First Amendment to the Federal Constitution which is at issue here. That amendment provides in pertinent part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. Amend. I.

Summary of Argument

The decision of the New York Court of Appeals should be affirmed. The Court may achieve this result either under the rule of *Everson* v. *Board of Education*, 330 U.S. 1 (1947), or under the rule enunciated in *Abington School District* v. *Schempp*, 374 U.S. 203 (1963). But the Court's affirmance should firmly establish the right of individuals to choose private education for their children, and the right of states to further education for all children, so long as the legislative purpose, as in the case of the statute under consideration, is strictly secular, and the primary effect is advancement of secular education, rather than advancement or inhibition of religion.

POINT I

Private education is a constitutional right.

Mr. Justice Brennan, concurring in *Schempp* said: "parents remain morally and constitutionally free to choose the academic environment in which they wish their children to be educated" 374 U.S. at 242. This principle had been firmly established in *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1924), where the Court held a state law unconstitutional which required that, absent special circumstances, all children must attend public school, and said:

> "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U.S. at 535.

And the North Carolina Supreme Court recently emphasized the need to protect nonpublic school diversity:

> "Standardization and regimentation in the field of learning is contrary to the American concept of individual liberty. It will be difficult to over-estimate the contribution of private institutions of learning to the initiative, progress and individualism of our people." *State* v. *Williams,* 253 N.C. 337, 345-46, 117 S.E. 2d, 443, 450 (1960).

The United States Commissioner of Education, Harold Howe II, in an address to the Association on March 4, 1967 said:

> "You [independent schools] can experiment with new course offerings that would arouse strong resistance

> if put forward by the public schools. As an example, I think independent schools have taken a commendable step forward with their decision to introduce major programs of sex education.
>
> "Your independence, then, gives you the freedom to shape an educational experience which is often superior to that available in many public school systems." THE INDEPENDENT SCHOOL BULLETIN, May, 1967, 14, 15.

Thus private education stands today as a vital and constitutionally protected right.

The parents of approximately 6,000,000 children* in the United States are currently reaching for something more than the standardization recognized by the Courts and educators alike as inherent in many public school systems. In New York, of the 4,150,000 present kindergarten-through-high-school pupils, some 900,000 or about 20% are currently receiving their education in the private sector. A. Hacker, N. Y. Times Magazine, October 1, 1967, p. 29.

Appellants by implication, if not directly, have injected the nature of parochial school education as a reason which they would have the Court consider for invalidating the legislation at issue. This is of course unjustified. Given the unquestioned right to receive a private school education, established by this Court, it is left to each state only to determine what standards of secular educational achievement must be met by private schools to provide the equivalent of the otherwise required public school education. See *Meyer* v. *Nebraska*, 262 U.S. 396, 402 (1923). When that standard is met—the secular standard—the state has no concern as to the concomitant which may or may not be taught with it, whether it be religion or political ideologies, so long as it is not "manifestly inimical to the public wel-

---

* STATISTICAL ABSTRACT OF THE UNITED STATES, 1967, at 111.

fare." *Pierce* v. *Society of Sisters, supra,* at 534. Otherwise there would not be that meaningful private education, which the Constitution protects. It follows that the extent or manner of instruction of the protected concomitants to a secularly approved curriculum is of no relevance to the right to a private education. And particularly irrelevant is the degree of permeation which may be alleged to exist as to any concomitant. For if we are to fear, and attempt to protect against, a concomitant, we must recognize that there is some form of concomitant in every form of education, and that its effect or strength is not necessarily measured by the degree to which it is emphasized.

Fortunately, we do not, and have not, as a people, and under our Constitution, feared the expression of any religious, or other belief, and have allowed each to pursue his own as he sees fit, so long as he trespasses not on the rights of others. As Jerome Lefkowitz said in *The Jewish World* under the caption "Faith and Pluralism":

> "I do not object to Secularism, my upbringing inclines me to it in many ways. But, make no mistake about it, Secularism is not the neutral position—it is a definite commitment. It is just as much an 'ism' as any other 'ism'." Quoted in C. Blum, EDUCATION: FREEDOM AND COMPETITION, p. 22 (Argus—1967).

POINT II

Education in private as well as in public schools has a public purpose, directly affecting the public welfare, and is a proper subject for expenditure of state funds.

In answering the due process argument which was unsuccessfully urged to defeat private school busing in *Everson*, this Court said:

> "The fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need.
>
> "It is true that this Court has, in rare instances, struck down state statutes on the ground that the purpose for which tax-raised funds were to be expended was not a public one. *Loan Association* v. *Topeka*, 20 Wall. 655; *Parkersburg* v. *Brown*, 106 U.S. 487; *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U.S. 55. But the Court has also pointed out that this far-reaching authority must be exercised with the most extreme caution. *Green* v. *Frazier*, 253 U.S. 233, 240. Otherwise, a state's power to legislate for the public welfare might be seriously curtailed, a power which is a primary reason for the existence of states. Changing local conditions create new local problems which may lead a state's people and its local authorities to believe that laws authorizing new types of public services are necessary to promote the general well-being of the people. The Fourteenth Amendment did not strip the states of their power to meet problems previously left for individual solution. *Davidson* v. *New Orleans*, 96 U.S. 97, 103-104; *Barbier* v. *Connolly*, 113 U.S. 27, 31-32; *Fallbrook Irrigation District* v. *Bradley*, 164 U.S. 112, 157-158.
>
> "It is much too late to argue that legislation intended to facilitate the opportunity of children to get

> a secular education serves no public purpose. *Cochran* v. *Louisiana State Board of Education,* 281 U.S. 370; Holmes, J., in *Interstate Ry.* v. *Massachusetts,* 207 U.S. 79, 87. See opinion of Cooley, J., in *Stuart* v. *School District No. 1 of Kalamazoo,* 30 Mich. 69 (1874.)" 330 U.S. at 6-7.

Treating the same issue in *Cochran* v. *Louisiana State Board of Education,* 281 U.S. 370 (1930), upholding the Louisiana law for providing textbooks to school children, both public and private, Chief Justice Hughes said:

> "Viewing the statute as having the effect thus attributed to it, we can not doubt that the taxing power of the State is exerted for a public purpose. The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded." 281 U.S. at 375.

The use of public funds for education thus becomes not only a power, but a responsibility of the state. How a state exercises such a conceded power and responsibility is something with which this Court has not seen fit to interfere except in rare instances, and this is so for the above expressed reason that "a state's power to legislate for the public welfare might be seriously curtailed, a power which is a primary reason for the existence of states." *Everson* v. *Board of Education, supra,* at 6.

We emphasize this state public purpose aspect of the statute under consideration, not because appellants have urged the contrary in support of their position, but because we submit that the Establishment Clause, to be considered in Point III below, must be interpreted in the light of the purposes of the Constitution as a whole, and particularly in

the light of the constitutional *right* to a private education, and the constitutional *right* of a state to provide for secular education as a public welfare, public purpose, responsibility.

The need for public support of some elements of private school education is widely recognized. The United States Commissioner of Education, in his above-mentioned address to the Association, after stating that "your experience and your perspective can be particularly valuable to the States", went on to say:

> "We will see more, rather than less, Federal aid to education in the years ahead for two reasons: First, the Congress knows that State and local funds alone cannot buy the kind of education we need to prepare students for a technological society and for a world beyond our shores that is infinitely more complex today than it was two decades ago. Second, a genuinely democratic society cannot tolerate the inequable distribution of quality that characterizes our State education system." THE INDEPENDENT SCHOOL BULLETIN, May, 1967, at 17.

And the Congress which, as the Commissioner points out, "is in some ways becoming our national school board," *ibid.*, has enacted legislation providing a broad range of benefits to all schools, specifically including private schools, as being in the nation's interest. See, *e.g.*, Elementary and Secondary Education Act of 1965, 79 Stat. 29, 20 U.S.C. §§236-44.

Theodore R. Sizer, Dean of the Harvard Graduate School of Education, addressing the Teacher Training section of the Association on the same date, said:

> "How to finance this necessary and responsible increased cost? In my judgment the average independent school will not be able to increase its income the requisite amount and still hold tuition down low

enough to provide for a varied student body. The only recourse is public funds, and I am prepared to argue that support of private education is in the public interest. Public education needs competition, the pace setting and goading which strong independent schools might provide." THE INDEPENDENT SCHOOL BULLETIN, *supra*, 19, 21.

The New York textbook law was enacted by a vote in the Assembly of 116 to 27, and in the Senate by 50 to 7, thus providing ratios of 4 to 1 and 7 to 1.* It was signed by the Governor. At least six other states have passed legislation in various forms providing textbooks for private school pupils.** Any constitutional inhibition relied upon to nullify social needs and purposes so urgently, authoritatively, and widely expressed, must be found in a form permitting no other interpretation, and only after all efforts have been made to accommodate all of the purposes expressed within the four corners of the Constitution.

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* Certificates of Clerk, New York State Assembly and Secretary, New York State Senate, March 25, 19, 1968.

** Burns Indiana Stat. Ann. 1933, §28-512 (1948); Kansas Stat. Ann. §72-4107 (1964); La. Rev. Stat. Tit. 17, §351 (1963); Miss. Code Ann. 1942, Tit. 24, §6656 (1952); General Laws of Rhode Island, 1956, §16-23-2 (Supp. 1965); W. Va. Code Ann. §18-5-21b (1966).

POINT III

The First Amendment does not forbid aid to education for a secular purpose where the primary effect is neither to advance nor to inhibit religion.

In *Everson* the Court held that New Jersey busing of private school children did not violate the First Amendment on the grounds that:

> "The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." 330 U.S. at 18.

Application by this Court of the same criteria to the New York textbook law will establish the constitutionality of that law also. For certainly it can be said as to the New York law too:

> "The State contributes no money to the schools. It does not support them. Its legislation, as applied does no more than provide a general program to help parents * * *" *obtain secular textbooks for their children, regardless of their religion, for use in schools which comply with the compulsory education law.*

Those espousing appellants' cause and seeking to narrow down the *Everson* formula to a point where they can nullify the New York textbook law, apparently urge that any child benefit furnished within a church related school must be wholly divorced from education (dental care and milk); while that provided away from such a school's premises (busing) may include some educational benefit, *i.e.*, transportation to the classroom. One may ask whether there may not be "danger" from a saying of grace before

milk, or a prayer of thanks after dentistry. More importantly, one may ask how appellants' rules would apply to a state's furnishing of funds to educational television stations when such funds are used by the station to broadcast, by closed circuit or otherwise, class work to public and/or private schools. Is the benefit deemed rendered to the child at the television station, or to the child in the school? If the state elects to prepare motion picture films for instruction purposes, can it permit their use in private schools without charge? If the state elects to provide funds for improving the teaching capacity of teachers, can the private school teacher be a beneficiary of such a course, or is there fear that that benefit might get into the school? If the state elects to sponsor science clubs among students, under the supervision of the teachers in whatever school a child may attend, are the state and nation to be deprived of the benfits which would flow from inclusion in such science clubs of the 20% of New York children who attend private schools? Can a state lend musical instruments to all children, or does the Establishment Clause prohibit aid to music in private schools?

Unless this Court establishes constitutional guide lines which will permit a resolution of such questions, legislation which is in the interest of the broadest public welfare, both that enacted and that which would otherwise be enacted, may be thwarted in the critical years ahead.

We find nothing in *Everson* which justifies this mechanical and artificial "in school-outside school" formula which appellants would attribute to this Court. On the contrary, the Court in *Everson* recognized that the aid approved would result in an incidental benefit to schools having a concomitant religious purpose; but the statute was upheld in circumstances where the objective and pri-

mary effect were clearly secular. The test was later succinctly and definitively stated in *Schempp* where the Court said:

> "That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." 374 U.S. at 222.

Application of these criteria to the New York textbook law is not difficult. The law was enacted by overwhelming vote of the legislature, to provide textbooks for 4,100,000 children in the State of New York. It was enacted in response to the above-stated finding of the legislature "that the public welfare and safety require that the state and local communities give assistance to educational programs" —not just 80% of educational programs. This finding reflects the same need for state aid to education which has been found to exist by the Congress, other states, and educational authorities all as referred to under Point II above. On this record, no hint exists that the New York statute had other than a secular legislative purpose. The first criterion of *Schempp* is thus clearly met.

It is equally clear that the "primary effect" criterion of *Schempp* is as fully met. The brief of the American Jewish Committee and others, as *amici*, rightly states that "purpose and effect are inextricably bound together." (p. 33). Thus it must be presumed that the Legislature would not enact a statute designed to achieve a specific purpose without being satisfied that the primary effect of the enactment would in fact be to achieve that purpose.

The statutory purpose of furthering the education of 4,100,000 New York State children was implemented under the subject statute by requiring book selection by the pub-

lic school organization.* No surer guardian of the secular could have been chosen. The New York Court of Appeals found expressly that the statute merely made available "secular textbooks". 20 N.Y. 2d at 117, 281 N.Y.S. 2d at 805.

Thus under this statute the private school child receives a book which the legislature provided for him for the purpose of achieving the secularly sanctioned purpose of statewide improved education, and the book itself is chosen by a secular group to achieve a secular purpose. The "primary effect"—meaning first in importance, chief, or principal—can only be the furthering of that secular education which the state has a responsibility to foster.

And let it be kept perfectly clear that the Establishment Clause is not concerned with the effect of the education which a particular school may offer. It is only concerned with the primary effect of the aid provided by the state. And, if as here, that effect is clearly secular, and is in legitimate furtherance of the primary and secondary school education of the State's public school children, then it is indeed difficult to understand how, as urged by appellants, the same identical program could produce a totally different and prohibited primary effect as to the private school children. Certainly there is nothing in the record in this case to establish the existence of a mysterious force which transmutes a secular primary effect as to 80% of the State's

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* The statute at issue here requires that the books lent to private schools be approved either for use in the public schools or "by any boards of education, trustees or other school authorities." Section 2, ¶12 of the Education Law defines school authorities as follows:

> "School authorities. The term 'school authorities' means the trustees, or board of education, or corresponding officers, whether one or more, and by whatever name known, of a city school district, or other school district however created."

Since §701 refers to "*other* school authorities," and since "school authorities" is defined to mean public officials, it is clear that books lent to private schools must be approved by public officials.

school children, into a sectarian primary effect as applied to the remaining 20%.

The New York textbook statute provides a form of aid to education which fully qualifies under the criteria established by this Court in *Everson* and *Schempp*.

POINT IV

Schempp provides the applicable rule.

The history of the Establishment Clause has been treated exhaustively by this Court's opinions. Nothing in that history, nor in the decisions arrived at in the light thereof, gives substance to the contention that the criteria of *Schempp* are contrary to the historical purposes of the Establishment Clause, to the earlier cases decided thereunder, or to the application of *Schempp* urged herein.

The American Jewish Committee, *et al.*, as *amici*, after proposing their concept of a "child benefit" theory, which, for the reasons indicated above, we regard as unrealistic, allocate pages 25 to 38 of their brief to *Schempp*. Dealing with pre-*Schempp* decisions, to show from what *Schempp* developed, they refer to six cases:

(i) *Quick Bear* v. *Leupp*, 210 U.S. 50 (1908), allowing Indians to expend their own funds for tuition, in any school they chose, and hence not here particularly relevant.

(ii) *Everson* v. *Board of Education, supra*, allowing use of public funds to bus New Jersey private school children, and hence highly relevant here because the busing of all children would be in the same class of *Schempp*-qualifying secular state aid as is the providing of secular textbooks for all children.

(iii) *McCollum* v. *Board of Education*, 333 U.S. 203 (1948), where it was held improper to use public

school premises for sectarian teaching of public school children. *Schempp* would not permit this either. Both the legislative purpose and the primary effect would clearly mark this as unconstitutional. Nor was there anything inconsistent between this holding and those which sanction the use of public parks by religious groups, just as other non-religious groups may use them.

(iv) *Zorach* v. *Clauson,* 343 U.S. 306 (1952), another released time case upholding a law allowing children under initial public school attendance compulsion to have released time for attendance at religious schools. This holding goes further than anything we have urged.

(v) *Engel* v. *Vitale,* 370 U.S. 421 (1962), holding unconstitutional the recitation in public school of an officially composed prayer. This would also be invalid under *Schempp* as to both purpose and effect.

(vi) *Bradfield* v. *Roberts,* 175 U.S. 291 (1899), upholding the use of Federal funds for construction of a sectarian hospital. Appellants find this legitimate because "welfare" was the purpose rather than education. We fail to see why support under the name of "welfare" would be proper, if that under the name of "education" would not. Education is welfare. But the secular legislative purpose and secular primary effect required by *Schempp* were both present in *Bradfield.*

Schempp therefore "discarded" no existing law. It merely synthesized well-established interpretations then existing. It overruled nothing. *Schempp* today provides the criteria which will permit the fifty states to continue to serve as laboratories, free to find the ways in which education, including private education, can best be furthered in an era when all our resources must be supported to produce the best and the maximum in all areas of education.

CONCLUSION

For the reasons set forth herein, the judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted,

ETHAN A. HITCHCOCK
1 Rockefeller Plaza
New York, N.Y. 10020

WEBSTER SHEFFIELD FLEISCHMANN
HITCHCOCK & BROOKFIELD
1 Rockefeller Plaza
New York, N.Y. 10020

I. N. P. STOKES
MAXIMILIAN W. KEMPNER
Of Counsel

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 660

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACK, SAND LAKE and NORTH GREENBUSH, RENSSELAER COUNTY and CHATHAM, COLUMBIA COUNTY and BOARD OF EDUCATION OF UNION FREE DISTRICT NO. 3, TOWNS OF NORTH HEMPSTEAD and OYSTER BAY, NASSAU COUNTY, NEW YORK,

Appellants,

v.

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York,

Appellee,

and

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH and BARBARA BRENNAN,

Intervenors-Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS, *AMICUS CURIAE*

JULIUS BERMAN
SIDNEY KWESTEL
MURRAY J. LAULICHT
Attorneys for Amicus Curiae
c/o National Jewish Commission on
Law and Public Affairs
119 Nassau Street
New York, New York 10003

MARVIN SCHICK,
Special Consultant.

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Cushman, Public Support of Religious Education in American Constitutional Law, 45 Ill. L. Rev. 333 (1950) 23

Encyclopedia of Educational Research 1517 (3rd ed. 1960) 8

Ciannella, Religious Liberty, Nonestablishment, and Doctrinal Development, 81 Harv. L. Rev. 513, 515, 519-20, 521 (1968) 19, 22, 23

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APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS, *AMICUS CURIAE*

This brief is submitted with the consent of counsel of the parties on behalf of the National Jewish Commission On Law And Public Affairs and is joined in by the following organizations:

Agudath Israel of America
Association of Orthodox Jewish Teachers
National Council of Young Israel
Poalei Agudath Israel of America
Rabbinical Alliance of America
Rabbinical Council of America
Religious Zionists of America
Torah Umesorah, National Society of Hebrew Day Schools
Union of Orthodox Jewish Congregations of America

Interest of the *Amicus Curiae*

The National Jewish Commission On Law And Public Affairs is a voluntary association organized to combat all forms of religious prejudice and discrimination and to represent the position of the Orthodox Jewish community on matters of public concern. The Commission is deeply committed to the preservation of constitutional rights for all Americans, and in particular to the principles of the First Amendment, in the belief that thereby Americans of the Jewish faith, in common with all Americans, will enjoy the blessings of liberty. Recognizing the importance of a healthy educational system to the welfare of a free society, the Commission firmly supports the advancement of educational opportunity for all American schoolchildren. We believe that the welfare of all society benefits through programs that promote the betterment of the education of all children. Accordingly, we submit this brief in the belief that the New York Textbook Law, consistent with the principle of separation of church and state, is a legitimate and equitable expression of the State's esponsibility for the development of educational programs which are essential to all schoolchildren.

Question Presented

Is New York barred by the First and Fourteenth Amendments from adopting an educational program, completely under the control of public authorities, which provides for the loan of approved textbooks in secular subjects to students who attend elementary and secondary schools which also provide religious instruction?

Statement of the Case

The appellants brought an action challenging the constitutionality of the New York Textbook Law (Chapter 320 of the Laws of 1965; Education Law, Section 701), which went into effect on September 1, 1966. Section 701.3 provides:

> "In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities. Such text-books are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities."

The complaint alleged that this section violated the New York State Constitution and the First and Fourteenth Amendments to the United States Constitution. The trial court ruled that the law contravened both the federal and State constitutions. The Appellate Division, Third Department, reversed on the ground that appellants lacked standing. The court added that it was "satisfied" that the statute contravened neither the federal nor the State constitution. Two justices stated in a concurring opinion that the textbook law "did not aid directly or indirectly the school attended by said child."

The Court of Appeals reversed as to appellants' standing and by a majority vote upheld the statute, with the majority declaring that "the statute is meant to bestow a public benefit upon all school children . . . ." An appeal was taken to this Court and probable jurisdiction was noted on January 15, 1968.

Argument

The State government has a responsibility for the proper education of children of school age within the State. This duty does not end when children receive their secular instruction in parochial schools. Because textbooks are vital to curriculum development and to the fulfillment of educational opportunity, a State may decide that the public welfare is advanced through a public program guaranteeing adequate textbooks to all schoolchildren.

New York's textbook program is wholly public in its conception and administration; the statute, administrative rulings and procedures adopted by local public educational officials insure that the books are supplied on a loan basis, remain the property of public boards of education, are those that can be used in public elementary and secondary schools, and concern only secular subjects. No control is vested in sectarian authorities nor does the program, directly or indirectly, promote religion or assist religious institutions.

Rulings of this Court and relevant expressions by noted constitutional authorities make plain that, consistent with the establishment and free exercise clauses, State governments may adopt a neutral role in religious affairs by extending public benefits to children attending parochial as well as other private schools in an effort to promote the general welfare and insure full educational opportunity for all schoolchildren. Indeed, a State's refusal to provide for the welfare of parochial schoolchildren, while meeting the needs of all other students, public and non-public, may possibly infringe the religious freedom of the children who exercise their constitutional right to receive secular instruction in church-related schools.

POINT I

New York's textbook program is designed to promote the public interest in the proper education of all schoolchildren, irrespective of the school they attend.

A. The State's Responsibility for Education.

The Constitution of New York, Art. XI, Sec. 1, in common with the policy in all our other states, guarantees a free public education to all children of school age within the State. The purpose of this provision is to make crystal clear the State's obligation in the area that is at the heart of the health and welfare of society. As the Court stated in *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954): "Today, education is perhaps the most important function of state and local governments . . . . It is the very foundation of good citizenship." So important is this responsibility that the costs of elementary and secondary education are today the highest items in the budgets of our states and local communities. These costs continue to rise with the growing awareness that education requires the fullest commitment of governmental resources.

Non-public schools, whether private or parochial, perform this key governmental responsibility when they educate students in the subjects that ordinarily are taught in the public schools. They do so not because they reduce the pressure on the public exchequer, but because they are doing the job of government in much the same way that government would do it. Private and parochial schools, therefore, are quasi-public institutions; they are like hospitals operated under private or sectarian auspices which perform the governmental responsibility for the maintenance of public health and are vested with a public interest. Accordingly, it is of major governmental concern that children or patients served by such public institutions under nongovernmental sponsorship are not denied general secular aid within the constitutional limits which have been expressed by this Court.

The responsibility of New York, like any other state, for the education of all children between the approximate ages of six and seventeen is not satisfied simply because students are enrolled in a school of their choice and formally comply with the compulsory education law. The government's commitment, consonant with the very reason why it invests so heavily in education, extends to the heart and dynamic of the educational process—to the quality and effectiveness of instruction and to what goes on in the classroom. The State willingly shoulders the guarantee that the process of education will not be an empty one, producing children who do not develop their potential and are incapable of meeting the needs of our growing society.

We can point to no litmus test which will tell us when this qualitative concept of educational responsibility is fulfilled. Yet, this much is clear: the State's responsibility to insure and encourage excellence in elementary and secondary education extends to the student whatever his school—public or non-public.

New York has laws and regulations governing the safety of buildings used as schools, the adequacy of laboratory, library and other educational facilities, the length of the school day, the number of days in the school calendar, and the subjects taught. Satisfactory performance on Regents Examinations is required in specified high school subjects; this requirement does not vary according to who operates the school. Moreover, consistent with the State's responsibility for the health, safety and welfare of school children, New York maintains a busing program available to all students and many localities provide school crossing guards. Similarly, in defining and articulating the nature of its commitment to the educational welfare of all students in elementary and secondary schools, New York has undertaken a textbook program which benefits all students in grades seven through twelve. New York has done so for

reasons plainly expressed in the preamble to the challenged statute:

> "The security and welfare of the nation require the fullest development of the mental resources and skills of its youth. This calls for more adequate educational opportunities and increased efforts to educate more of the talent of our nation and requiring the correction of those imbalances in our educational programs which have led to an insufficient proportion of our population educated in the fields of science, mathematics, foreign languages and other non-sectarian subjects. The Congress of the United States has reaffirmed the principle that the States and local communities retain primary responsibility for public education. It is hereby declared to be the public policy of the State that the public welfare and safety require that the State and local communities give assistance to educational programs which are important to our national defense and the general welfare of the State."

The New York Court of Appeals in upholding the statute, had this to say about the statement of policy:

> "There can be no serious suggestion that the declaration of purpose by the Legislature was a verbal smoke screen designed to obscure a nefarious scheme to circumvent the New York State Constitution. *No one in the last third of the 20th Century can doubt that a program aimed at improving the quality of education in all schools is a matter of legitimate State concern.*" (20 N.Y. 2d at 116; emphasis supplied).

We do not maintain that the State is constitutionally mandated to extend qualitative educational benefits to children who attend non-public schools, but when it decides that it is in the public interest to include in one over-all program all schoolchildren in a public program operated and supervised by public officials, there can be no question that this affirmation of a public responsibility is fully consistent with the First Amendment. Indeed, the warning

sounded by Mr. Justice Black in *Everson* v. *Board of Education,* 330 U.S. 1, 16 (1947), then becomes most relevant:

> "... we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief."

B. The Role of Textbooks in Curriculum Development.

Recognition of the pivotal importance of textbooks in the educational process is central to an understanding of the nature of the public benefit here under attack. Quality instruction requires that students have quality texts. In 1931 a distinguished committee of educators established by the National Society for the Study of Education declared that "it is the textbook that in thousands of classrooms determines the content of instruction as well as the teaching procedures." *The Textbook in American Education,* Thirtieth Yearbook of the National Society for the Study of Education, Part II, p. 1. A more recent study of the use of texts begins: "At the center of the present-day educational scene in America is the textbook. It takes a dominant place in the typical school from the first grade to the college. Only the teacher—and perhaps a blackboard and writing materials—are found as universally as the textbook in our classrooms." Lee J. Cronbach, *Text Materials in Modern Education* 3 (1955).

A survey article on the subject in the *Encyclopedia of Educational Research* 1517 (3rd ed. 1960) explains the acceptance of textbooks:

> "Originally ... the American school whether public or private was a language school—a school in which reading and arts and sciences dependent upon reading were its *raison d'etre.* To this day it stands true to that purpose. It is—besides many other things—a school of the book, using the term *book*

> in its widest and most useful sense. The historical process, thertofore, has added a fourth dimension to the three already mentioned as the essentials of the American school system. That system—call it S—now basically includes T the teacher, P the pupil, M the meeting place, and B the book. In brief, S comprises T, P, M, and B."

Textbooks are a means of transmitting knowledge and culture to students. They serve as a bridge to the learner, helping him understand and respond to his own environment. Given the present utilitarian and functional bent of education, there is, according to education experts, no substitute methods for students to acquire the basic information which they must have if they are to progress properly in their studies and also be prepared to become responsible and self-reliant citizens. There is simply too much to learn to expect the educational process to operate without these storehouses of accumulated knowledge and experience. With the recent growth of so many disciplines, particularly in the physical and behavioral sciences, it is clear that reliance on textbooks in years to come will increase radically.

Text materials establish the framework for classroom instruction, but they can do much more. For the inquisitive student, they provide an opportunity for self-instruction transcending the day to day learning process, opening up new vistas of personal investigation in library books and other avenues of exploration. For the teacher, especially those in fields subject to quick and far-reaching change, "the text is potentially an educational leader which can beckon teachers into new paths." Lee J. Cronbach, "The Learning Process and Text Specifications," *Text Materials in Modern Education, supra*, 90.

If students are not provided up-to-date quality texts, the learning process—and inevitably society—suffer. The State, therefore, has a direct and fundamental interest in seeing to it that students in all schools are properly equipped with current textbooks. This is what New York

has done through its textbook program. No allegation of violation of the First Amendment should obscure the fact that the provision of textbooks is designed to insure a proper education for all children in elementary and secondary schools within the State in fulfillment of the State's educational responsibilities.

C. The State's Control Over the Textbook Program.

The textbook law enacts a public program which promotes a vital public responsibility and interest. It is also important to recognize that in all respects the program is subject to full control by public authorities and is not controlled by religious officials.

According to Section 701.3 of the textbook law the job of selecting the books is vested in local public school boards; the texts are required to be those "designated for use in any public, elementary or secondary schools of the State or . . . approved by any boards of education, trustees or other school authorities." The State Board of Regents and the local boards of education are authorized to prescribe rules and regulations governing the loan of textbooks to schoolchildren.

Following the adoption of the law and prior to its effective date, the State Department of Education, in an Opinion of Counsel,* elaborated on the provisions of the law. Paragraph 6 of the Opinion, entitled "Limitations on kinds of textbooks," declares that it is necessary that

> "a. The textbook be non-sectarian (this eliminates denominational editions and those carrying the 'imprimatur' or 'nihil obstat' of a religious authority), and
>
> b. The textbook had been designated for use in any public elementary or secondary schools of the state or . . . approved by any school board."

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* The entire opinion is printed in the Appendix to the Appellants' brief.

c. In case of doubt as to a. above, the school board must make the appropriate determination; and in case of doubt as to b. above, the school board should make appropriate inquiries from the school board concerned, or else decide if it wishes to approve the same, itself."

Thus, the effect of this Opinion is to reinforce the public character of the program and the administrative control of public school boards, in line with the intent of the New York Legislature. Another paragraph of the Opinion underscores the same principle:

"16. *Accounting and Storage.*

a. All books remain the property of the School district and must be treated as such. Such ownership should be indicated in or on each book by labels or other appropriate methods of identification.

b. There is no reason why textbooks used in a non-public school could not be stored in that school under an agreement with the school board and the governing body of the non-public school. The district may not, however, pay storage charges to non-public schools in this connection."

While public control is made crystal clear, the Opinion also demonstrates that the program creates a direct relationship between a public agency and individual students:

"12. *'Upon individual request'*:

Under the statute, both the power and the duty to purchase and loan textbooks depend upon individual requests to the school board for such textbooks.

In compliance therewith, the non-public school could either forward such individual pupil requests to the school board collectively or keep such requests on file and forward merely a summary of the requests to the board of education. In any event, however, the requests of each student must be addressed to the board of education of the district of residence."

However, individuals cannot purchase books on their own and then seek to collect payment from their local school boards. In recent proceedings the New York Commissioner of Education ruled that "since the [textbook] statute, further, does not provide for textbook purchases by individuals, I cannot, therefore, in any event, direct the respondents to honor invoices for textbooks so purchased and acquired by the individual appellants." *In the Matter of Rosemary Williams,* No. 7831, Ruling of Commissioner James E. Allen, Jr., November 9, 1967.

School boards throughout New York State have issued instructions and prepared forms designed to guarantee that they will exercise the requisite public control over the program. These instructions plainly belie the allegation that sectarian officials will determine the operations of the program. For example, in New York City, a list is compiled annually by the Board of Education "for use in requesting textbooks in accordance with New York State Textbook Law." A statement introducing the 1967 edition of the list makes abundantly clear how public control has been strictly and exclusively maintained:

> "Titles on the approved List of Textbooks have been appraised by committees of supervisors and teachers in the various subject-matter areas. These committees have been guided by established evaluative criteria approved by the Board of Education. These criteria were set forth in full in the brochure 'Selecting Instructional Materials for the Public Schools of New York City.'"

The 1967 list comprises 508 pages; not a single listing is of a book that is in any way sectarian in its content.

New York City's Board of Education has also issued a "Manual of Instructions" containing "Record-keeping Procedures for Textbooks Loaned in Conformance with Provisions of the New York State Textbook Law." (The Manual, without the sample forms, is set forth as an Appendix to this brief.) These instructions show that

the books are merely loaned to the students, with ownership permanently remaining in the Board.

Accordingly, we submit that plainly the New York Textbook Program retains in all aspects its public character and purpose, which is to guarantee educational opportunity to all schoolchildren.

POINT II

The textbook program is not an "establishment of religion" in violation of the First Amendment.

New York's textbook statute is challenged principally on the ground that it establishes religion. This allegation apparently is based on the notion that the public nature and purposes of the program are irrelevant to a determination whether the major objective of the law is to benefit society or religion.

Religion does not benefit, either directly or indirectly, when New York performs its duty to guarantee a quality education to children in both public and non-public schools. The program under attack here is in its entirety a public enterprise; control, as we have seen, is fully vested in public officials; no money is given to any religious institution; nor is a parochial school free to allocate funds to sectarian purposes as a result of this law. In *Cochran* v. *Louisiana State Board of Education,* 281 U.S. 370, 374-375 (1930), this Court upheld an identical statute, making plain the relevance of the public facets of the statute in determining the constitutional question:

> "One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian or even public school. The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that

> the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or non-sectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries. It is also true that the sectarian schools, which some of the children attend, instruct their pupils in religion, and books are used for that purpose, but one may search diligently the acts, though without result, in an effort to find anything to the effect that it is the purpose of the state to furnish religious books for the use of such children. . . . What the statutes contemplate is that the same books that are furnished children attending public schools shall be furnished children attending private schools. This is the only practical way of interpreting and executing the statutes, and this is what the state board of education is doing. Among these books, naturally, none is to be expected, adapted to religious instruction."

Speaking for a unanimous Court, Chief Justice Hughes said of the statute:

> "Its interest is education, broadly; its method comprehensive. Individual interests are aided only as the common interest is safeguarded." *Ibid.*

To be sure, *Cochran* was not decided on First Amendment grounds. This fact, however, does not devitalize its logic nor does it limit its applicability to cases where First Amendment allegations are not raised. In *Everson* v. *Board of Education,* 330 U.S. 1 (1947), this Court plainly rejected the opportunity to overrule *Cochran.* Indeed, Mr. Justice Rutledge, in dissenting, linked the earlier decision on textbooks with the new ruling on the busing of parochial schoolchildren (330 U.S. at 29).

In *Everson,* this Court upheld a New Jersey statute reimbursing parents of parochial schoolchildren for the costs of transportation to and from school and explicitly declared that the public purpose of the State's program was crucial to a determination of the infringement *vel non* of the establishment clause. After declaring that the intention of the establishment clause was to erect "a wall of separation between Church and State," Mr. Justice Black declared:

> "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief." (330 U.S. at 16)

Mr. Justice Black went on to say that the First Amendment does not prohibit New Jersey from spending public funds to pay the bus fares of parochial school students even though "it is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State" (at p. 17).

The *Everson* decision compels a similar result with respect to the New York Textbook Law. A state program of transporting children to school affects all students equally and is more closely related to religious education than is the supplying of textbooks. In the first place, it is highly unlikely that a parent's decision whether to send his child to one school rather than another will be influenced by the existence of a textbook program with a maximum outlay per year of $15 per child. In addition, while transportation brings the child to the school in which he receives both secular and religious instruction, only secular textbooks are furnished by the State.

In its most recent explication of the establishment clause, this Court said:

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the stricture of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Abington School District* v. *Schempp,* 374 U.S. 203, 222 (1963).

What is the purpose of the New York statute? Surely, as we have demonstrated in Part I, there is a "secular legislative purpose" in a program which is designed to supply quality secular educational tools to schoolchildren. The fact that textbooks are furnished to students in all private schools—parochial and non-parochial—makes it clear that the purpose of the law is secular. What is the law's primary effect? Clearly, it is not the advancement of religion, for no church or religious program is assisted through the provision of secular textbooks which remain the property of the State. Indeed, it requires a distortion of both the purpose and the effect of the statute to contend that either in its conception or administration the textbook program promotes a sectarian purpose or advances reli-

gion. The purpose and effect of the law is simply to make available to all schoolchildren the best possible textbooks—nothing more and nothing less.

Thus, the constitutionality of the statute is clearly encompassed within the views of Mr. Justice Frankfurter, an ardent believer in strict separation between church and state, who declared in *McGowan* v. *Maryland*, 366 U.S. 420, 466 (1961), that "once it is determined that a challenged statute is supportable as implementing other substantial interests than the promotion of belief, the guarantee prohibiting religious 'establishment' is satisfied."

The textbook law implements the State's vital interest in the education of all schoolchildren. To reach a decision of unconstitutionality would require repudiation of the standard that this Court has consistently referred to in "establishment" cases. And, to do so, would mean not only to break with precedent but also to strike down numerous federal and state programs similarly effectuating valid state interests but involving sectarian institutions. The National Defense Education Act, the Elementary and Secondary Education Act, and the G.I. Bill of Rights are three congressional statutes that would be struck down in whole or in large part. State laws providing loans and scholarships to students in sectarian colleges would face a similar fate.

Moreover, a ruling that this limited textbook program is unconstitutional would have an impact on social welfare programs far beyond the field of education and would strike at the heart of the entire anti-poverty program which to a far greater extent than the furnishing of textbooks utilizes church-related institutions to accomplish secular legislative purposes. These enactments, along with New York's Textbook Law, reflect the belief of legislators throughout this country that the modern conception of the governmental responsibility to promote the general welfare requires the extension of public benefits to individuals who receive public services in sectarian institutions and do not infringe the establishment clause.

POINT III

New York's statute does not violate the free exercise clause of the First Amendment.

The textbook program is also attacked as an infringement of the free exercise clause of the First Amendment. We believe that this claim requires little attention because it is patently without any foundation. The key element in the denial of one's right to practice his religion is compulsion and it is plain that the statute is not in the slightest bit cocercive. As Mr. Justice Clark stated in *Abington* v. *Schempp, supra*:

> "The free exercise clause, likewise considered many times here, withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." 374 U.S. at 222-23.

When schoolchildren are supplied with secular textbooks, it is somewhat strained, we submit, to maintain that anyone is coerced in the practice of his religion.

While the free exercise claim raised by the appellants is spurious, we believe that the theory behind the First Amendment requires this Court to consider whether the denial of secular textbooks to parochial school students, while the state furnishes such textbooks to children in all other schools, would be a denial of the freedom of religion of these students and their parents. State discrimination of this sort amounts to forbidden pressure on religious-minded persons when utilizing their constitutional privilege of parochial school education in order to receive public benefits extended to all others by the State.

In *Everson* v. *Board of Education, supra*, Mr. Justice Black declared:

> "On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation." 330 U.S. at 16.

Mr. Justice Black continued that this does not mean that "a state could not provide transportation only to children attending public schools." But, Mr. Justice Black did not suggest in *Everson* that the State was free to discriminate against religion by transporting all non-parochial schoolchildren. Accordingly, Professor Kurland has interpreted *Everson* to mean that "a classification [of governmental assistance] in terms of public and non-public schools would be valid." Kurland, *Of Church and State and the Supreme Court*, 29 U. Chi. L. Rev. 29 (1961). To Professor Kurland, the church-state opinions of this Court add up to a single principle: "That government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden." (At page 96.) Another eminent scholar wrote recently:

> "To withhold studiously from religious groups all benefits flowing from governmental structuring of the social order will not only result in deprivations not demanded by the purposes of nonestablishment but in some cases will actually frustrate them." Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, 81 Harv. L. Rev. 513, 515 (1968).

These ideas have long found acceptance in the decisions of this Court: "Freedom of religion is not merely reserved for those with a long purse." *Follett* v. *McCormick*, 321 U.S. 573, 576 (1944). Thus, in *Sherbert* v. *Verner*, 374 U.S. 398 (1963) the Court ruled that South Carolina had infringed the free exercise of religion of a sabbath observer when it denied her unemployment compensation after she lost a job for refusing to work on Saturday. Mr. Justice Brennan, speaking for the Court, held:

> "In a sense the consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation within the state's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end, of our inquiry. For '[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as only being indirect. *Braunfield* v. *Brown*, . . ." 374 U.S. at 403-04.

We submit that to disqualify parochial school students from governmental benefits made available to all students —public and non-public—would constitute religious discrimination in patent violation of *Sherbert* v. *Verner*. New York's Textbook Law avoids such invidious discrimination—its benefits are available to all as the benefits of South Carolina's unemployment compensation law were not. We urge the Court to uphold the minimal right of the State of New York to promote a public policy that avoids placing any pressure on those who out of religious principles attend schools that are affiliated with religious institutions.

POINT IV

The religion clauses of the First Amendment read together require that the State maintain a position of neutrality in religious affairs and this end is furthered by the textbook program.

In *Abington* v. *Schempp, supra,* Mr. Justice Clark after reviewing the previous decisions regarding the "establishment" and "free exercise" of religion, concluded that the two clauses overlap in promoting a "wholesome 'neutrality'" in church-state relations. The *Everson* majority also thought this to be the purpose of the First Amendment: "That amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." 330 U.S. at 18.

The doctrine of neutrality has been authoritatively accepted as the correct meaning of the principle of separation of church and state. Accordingly, the State need not extend to all who receive secular instruction or other public services through church-related institutions the same benefits that it extends to those who receive the same services directly at or from public institutions; but neutrality does not forbid the State to furnish public benefits to persons at sectarian institutions.

Governmental neutrality in religious, as well as political and social matters, is at the heart of the healthy operations of our pluralistic society. If it is the hope and the purpose of the First Amendment to promote religious tolerance and freedom while minimizing abrasive religious conflict and tension, then a plan which permits the government to make available public benefits to persons at sectarian institutions is consistent with the First Amendment. On the other hand, the distortion of the separation principle to preclude such a program inherently highlights the religious factor, poisons the air of pluralism, and potentially increases competition between religious sects. For behind our belief in the separation of church and state, built into

the fabric of a pluralistic society, is the idea of voluntarism, the right of all to believe or not to believe and for those who profess religious faith of any kind to build up institutions that enable them to express their beliefs. Voluntarism is fundamental to religious liberty; it encompasses both religion clauses of the First Amendment. The aim of voluntarism

> ". . . is not to remove governmental burdens on the practice of religion but rather to assure that the establishment clause does not force the categorical exclusion of religious activities and associations from a scheme of governmental regulation whose secular purposes justify their inclusion. The principle of political neutrality recognizes that religious associations operate in the temporal realm and accordingly can be legitimately included among the beneficiaries of the prevailing order established and sustained by the state. If religious groups are to be effectively organized bodies rather than loose associations of mendicants, they must be able to own property, enter into contracts, hire employees, and engage in a host of activities with secular dimensions and consequences. In short, making religious voluntarism a reality requires that religious associations be treated with political equality and accorded civil opportunities for self-development on a par with other voluntary associations. For instance, to deprive churches of police and fire protection—because the state would be aiding religion in violation of the establishment clause—would be insupportable doctrine. The extremely serious disadvantage to religious associations would mark governmental hostility toward their development, not neutrality, and such invidious discrimination could lead only to bitterness and strife in the political arena, not insulation of politics from religion." Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development, supra*, at 519-20.

Professor Giannella goes on to conclude that

> "When there are both sound public policy reasons of a secular nature for extending certain benefits to religious activities and associations and countervail-

> ing policy reasons for not doing so, the matter is appropriately left for the legislature." *Id.* at 521.

See also Katz, *Religion and the American Constitutions* 75 (1964).

The position of Professors Giannella and Katz has been supported by numerous constitutional authorities, among them Professors Philip Kurland, Arthur G. Sutherland, Jr. (see, *Religion and the American Constitutions, supra* at 74); Robert E. Cushman (*Public Support of Religious Education in American Constitutional Law,* 45 Ill. L.Rev. 333 (1950)), and Paul G. Kauper, who stated:

> "If a strict neutrality theory is followed, the answer to the constitutional problem is readily indicated. By extending aid to all institutions that serve the secular purpose of the government's program, whether public or private, church-related or not, the government is being neutral. Indeed, it would be less than neutral and would be discriminating on religious grounds if it withheld assistance from church-related institutions only." Kauper, *Religion and the Constitution* 108 (1964).

Each of these noted authorities has fashioned his conception of the neutrality approach out of the previous decisions of this Court. They accept in full, as do we, the desirability of separation of church and state. We submit, in conclusion, that the "wholesome neutrality" in religious affairs that the First Amendment ordains as a precondition of religious liberty requires a decision upholding the right of the New York State Legislature to promote the public interest in education by providing secular textbooks to schoolchildren in all schools within the state.

Respectfully submitted,

JULIUS BERMAN,
SIDNEY KWESTEL,
MURRAY J. LAULICHT,
Attorneys for Amicus Curiae.

MARVIN SCHICK,
Special Consultant.

APPENDIX

Board of Education—City of New York

MANUAL OF INSTRUCTIONS

ON

RECORDKEEPING PROCEDURES FOR TEXTBOOKS LOANED IN CONFORMANCE WITH PROVISIONS OF THE NEW YORK STATE TEXTBOOK LAW

(CHAPTER 320, LAWS OF 1965)

JANUARY, 1967

1. TEXTBOOK INVENTORY RECORD

1.1 A Textbook Inventory Record card shall be maintained for each list-numbered text received. See Exhibit "A" for suggested form of this Textbook Inventory Record card.

1.2 The Textbook Inventory Record card shall record the date and number of books received, the number issued, the number returned and the balance.

1.3 At the end of each school year (or more often if desirable) a physical inventory shall be taken and the count recorded on the Textbook Inventory Record card. (See Section 3 on Physical Inventories.)

1.4 Books accounted for as "lost" (See Section 4 on Lost Textbooks) shall be recorded periodically on the Textbook Inventory Record card.

1.5 Books which are no longer useable because of condition should be returned to the Bureau of Supplies of the Board of Education. The Bureau of Supplies will issue receipts for such returns. These receipts should be kept on file and the number of books returned recorded under "Remarks" on the Textbook Inventory Record card.

1.6 Reasons for unusual discrepancies between physical inventory and the Textbook Inventory Record card, as adjusted for lost book entries and entries for discarded books should be explained in the column headed "Remarks".

2. Students' Requests for Loan of Textbooks

2.1 Any student to whom a textbook is loaned shall certify that he has requested and is in receipt of the textbook loaned to him in accordance with the provisions of the New York State Textbook Law, Chapter 320, Law of 1965, and that he is a resident of the New York City School District enrolled in grades 7-12.

2.2 The requests and certifications shall be separate for each list-numbered textbook.

2.3 The requests for any list-numbered textbook may be made by groups or classes or may be individual. (See Exhibit "B" for sample of request by a group or class.)

2.4 The requests shall be kept on file at the school, separated by list-numbered textbooks, and shall be available for audit by the Board of Education of the City of New York.

2.5 A "check mark" (√) should be placed in the "Reissue" column for any book which is not being issued for the first time.

3. Physical Inventories

3.1 A physical count shall be taken at the end of each school year of all textbooks on loan.

3.2 The physical inventory shall include textbooks out on loan as well as those in stock.

3.3 This physical inventory together with a reconciliation with the books received shall be prepared in duplicate (Exhibit "C").

3.4 One copy of the Textbook Inventory and Reconciliation shall be forwarded to:

Board of Education
Bureau of Supplies
44th Road and Vernon Boulevard
Long Island City, New York 11101

The duplicate shall be kept in the school files.

4. Lost Textbooks

4.1 The Board of Education of the City of New York requires its students to pay for destroyed, lost or mutilated textbooks on the following basis:

New (less than 1 year old)	90% of List Price
Good (1-2 years old)	75% of List Price
Half-Worn (2-3 years old)	50% of List Price
Old (over 3 years old)	33⅓% of List Price

(List prices may be obtained from the Textbook Order Manual or by contacting the Bureau of Supplies of the Board of Education.)

4.2 Students receiving textbooks on loan under the New York State Textbook Law shall be subject to the penalties set forth above for destroyed, lost or mutilated textbooks.

4.3 Collections of monies for destroyed, lost or mutilated textbooks shall be recorded on separate lists for each list-numbered textbook. The record shall contain the period covered, the list number, title and author of the textbook, the names of the students paying penalties, the book numbers of the destroyed, lost or muti-

lated books and the amounts collected. (See Exhibit "D".) These records of collections shall be maintained at the school and shall be available for audit.

4.4 At the end of each semester, all monies collected shall be summarized by titles of textbooks (Exhibit "E"). This summary, together with a covering letter (Exhibit "F") and a check covering total collections during the period, payable to the order of the "Administrator of Business Affairs" shall be forwarded to:

Board of Education
Bureau of Supplies
44th Road and Vernon Boulevard
Long Island City, New York 11101

SUPREME COURT, U. S.

MAR 2[illegible] 1968

JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1967

Case No. 660

BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 etc.

Appellants,

against

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York, *et als.*,

Appellees.

BRIEF OF THE NEW YORK STATE AFL-CIO, AS *AMICUS CURIAE*

New York State AFL-CIO,
30 E. 29th Street.
New York, New York, 10016.
689-9320

Edward C. Maguire,
Herman A. Gray,
Counsel.

Supreme Court of the United States

OCTOBER TERM, 1967

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BRIEF OF THE NEW YORK STATE AFL-CIO, AS *AMICUS CURIAE*

The New York State AFL-CIO respectfully prays that this Court accept this brief submitted as *Amicus Curiae* in support of the appellees.

The New York State AFL-CIO is a federated labor organization to which are affiliated over two thousand national and local labor unions operating in the State of New York which in turn represent more than two million working men and women.

The deep interest which labor unions have in assuring a sound education for the children of their membership needs no elaboration. That explains the application for permission to be heard.

ARGUMENT

At issue is the constitutionality of a New York statute which permits the public school authorities to lend books dealing with secular subjects to children in private schools, including parochial schools.

The Court of Appeals of the State of New York, which is the highest tribunal on questions of the State's constitution, has held that the statute does no violence to this document (20 N. Y. (2) 109). This, of course, was the really difficult question since the State's Constitution expressly provides that public property was not to be used, either directly or indirectly, in aid of any school under religious direction (Art. XI, Sect. 3).

The issue before this Court is much simpler. The United States Constitution contains no like detailed and specific ban. It prohibits the establishment of a religion by Congress. Even if this prohibition were to be imported into the Fourteenth Amendment, it would be an extreme distortion to say that the statute under review aims at or will aid in the establishment of any religious body by use of public funds.

There are hundreds of thousands of children who attend parochial schools in New York. The simple fact is that the parents of these children bear a double burden. They must pay for this private schooling and as taxpayers they contribute their share of the cost of the public school system. This statute undertakes only to ease part of this burden, and only a relatively minor part, by making text-books available on loan.

The proper education of children is a matter of prime concern to the public welfare. This holds true whether the children attend public or private schools. The children in

attendance at the parochial schools are just as much part of the future citizenry as are those in the public schools. If they be inadequately trained the damage will be just as great. The parochial schools will not close down if this statute be declared invalid. It will only mean that the parents who send their children to these schools will have that much less to spend on their education.

The State of New York and its municipalities now spend large sums of money in aid of the proper education of children, both intellectual and physical, without reference to the place where the education is being given. Public health services are made available to all children in need of them. Children in the parochial schools are given the same dental and medical care as those in the public schools. Scholarships and financial grants in aid of advanced studies are awarded without reference to the institutions in which these studies are to be pursued. In each of these programs, the matter of religion does not enter at all. The aid is being given to the child, as an individual, as a future participant in the work and life of our country. If a loan of secular text-books be held invalid because they will be studied in a parochial school, it is impossible to see how any of these other aids could stand up under attack.

CONCLUSION

It is respectfully urged that the holding of the Court of Appeals should be affirmed.

Respectfully submitted,

NEW YORK STATE AFL-CIO

EDWARD C. MAGUIRE,
HERMAN A. GRAY,
Counsel.

SUPREME COURT, U. S.

APR 1 1968

JOHN F. DAVIS, CLERK

No. 660.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, Towns of East Greenbush, Nassau, Schodack, Sand Lake and North Greenbush, Rensselear County and Chatham, Columbia County and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3, Towns of North Hempstead and Oyster Bay, Nassau County, New York,
Appellants,

v.

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York,
Appellee,

and

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH and BARBARA BRENNAN,
Intervenor-Appellees.

Appeal from the Court of Appeals of the State of New York.

BRIEF

Of the Lutheran Church-Missouri Synod as Amicus Curiae.

JAMES P. BROWN,
515 Olive Street,
St. Louis, Missouri 63101,
Attorney for Amicus.

ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

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Intervenor-Appellees.

Appeal from the Court of Appeals of the State of New York.

BRIEF

Of the Lutheran Church-Missouri Synod as Amicus Curiae.

INTEREST OF AMICUS.

This brief is submitted with the consent of counsel for the parties in behalf of The Lutheran Church-Missouri Synod, which is the corporate synod or parent church for some 6,000 member congregations located principally

in the United States and having in excess of 2,800,000 members.

For over 100 years the member congregations of this amicus have exercised the constitutional right recognized in **Pierce v. Society of Sisters** (1925), 268 U. S. 501, to operate elementary and secondary schools in compliance with state standards for secula education. At present, some 1,339 elementary schools and 24 secondary schools are being operated by the individual or cooperative efforts of the member congregations of this amicus.

This amicus and all its constituent bodies would be strongly opposed to any governmental attempt to limit or control the right accorded under the First Amendment to the free exercise of religion, including the right to maintain and opefate religiously-oriented schools. The correlative of the precious regard for the freedom to exercise one's religion is the obligation likewise to resist any benefit from government—local, state or federal—proffered to it as a religion or church. Not only does this amicus subscribe to the philosophy and beneficent purpose underlying the Establishment Clause of the First Amendment, it recognizes the operative force and pragmatic truth of the axiom that any particular program which the government subsidizes, it may regulate, and the recipient of the governmental benefit has no basis of complaint on account thereof. **Wickard v. Filburn** (1942), 317 U. S. 111, loc. cit. 131.

However, this amicus feels that there are and can be many efforts by government, under its power to promote the public welfare, including that of parochial school children, which may be countenanced under the religion provisions of the First Amendment, and it is to be hoped that the Court in applying the tests heretofore stated or as they may be refined will not on a doctrinaire basis preclude all such governmental efforts. Hence, the participation of this amicus.

SUMMARY OF ARGUMENT.

This Court has already established that not every form of state aid in the field of education transgresses the First Amendment just because children in church-related schools are also beneficiaries of the state program.

A state program will not violate the religion provisions of the First Amendment if it has a secular legislative purpose and its primary effect is not to advance religion.

New York's textbook law, by its own declaration of purpose and policy and on the basis of the current need of our society for all school children to have the educational tool of modern, quality textbooks, has an obvious, compelling, secular legislative purpose.

The secular impact of New York's textbook loan law in providing secular textbooks to all school children at their request on a loan basis is clear, and does not have the primary effect of advancing any one religion or all religions.

ARGUMENT.

Not all state legislation involving parochial school children necessarily transgresses the First Amendment. State aid to school children, including students in church-related schools, is constitutional if there is a secular legislative purpose and if its primary effect is not to advance religion.

1. The established tests—Everson and Schempp.

Any consideration of the issue before the Court must start with **Everson v. Board of Education** (1947), 330 U. S. 1.

This case apparently means different things to different people, perhaps understandably so as in the case of any landmark decision. But many who call it a seminal decision, would treat it as a terminal decision.

However, **Everson** did establish that not all state action in exercise of its public welfare power which involves aid or expenditures to or for the benefit of school age children, including parochial school children, necessarily transgresses the First Amendment as made applicable to the states by the Fourteenth Amendment. **Cantwell v. Connecticut** (1940), 310 U. S. 296. Rejected was a test so dogmatic that any and every form of benefit to a parochial school student is *ipso facto* an unconstitutional benefit to the church-related school he attends.

In **Everson**, this Court admonished itself that in protecting citizens from state-established churches the Court must "not inadvertently prohibit [a state] from extending general state law benefits to all its citizens without regard to religious belief." 330 U. S., loc. cit. 16.

Analyzing the facts and balancing the thrust of the majority and minority opinions, it would appear that

Everson stands for the proposition that certain forms of state aid may be granted to a parochial school child or his parents, notwithstanding a collateral or incidental benefit to the school he attends, if such benefit is accorded pursuant to a legitimate exercise of the state's power in the field of public welfare and to achieve a valid state objective and if such aid is accorded on a non-discriminatory basis without regard to religious beliefs or lack thereof and if the implementation of the state program remains under secular, public control. **Everson** recognizes explicitly that underwriting the cost of school transportation might enable certain parents to send their children to a parochial school who might otherwise be financially unable to do so, but, held the Court, this does not constitute financial support of the parochial school.

Everson says the state must maintain neutrality in its relations with groups of religious believers and non-believers. The First Amendment does not require the state to be the adversary of religion. "State power is no more to be used so as to handicap religions than it is to favor them." 330 U. S., l. c. 18.

Having established that a doctrinaire approach is not to be followed when considering state legislation vis à vis the First Amendment, the Court elaborated in **Abington School District v. Schempp** (1963), 374 U. S. 203, loc. cit. 223, on the test to be applied to state legislation, as follows:

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

2. The secular legislative purpose of New York's textbook loan law is clear.

The statement of policy of the New York legislature in enacting Chapter 320 of the Laws of 1965 is as follows:

> "Section 1. Statement of policy. The security and welfare of the nation require the fullest development of the mental resources and skills of its youth. This calls for more adequate educational opportunities and increased efforts to educate more of the talent of our nation and requiring the correction of those imbalances in our educational programs which have led to an insufficient proportion of our population educated in the fields of science, mathematics, foreign languages and other nonsectarian subjects. The Congress of the United States has reaffirmed the principle that the states and local communities retain primary responsibility for public education. It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense, and the general welfare of the state." (As quoted in the concurring opinion of Staley, Jr., J., in the Appellate Division of the Supreme Court of New York. Page 45a of Appellants' Separate Appendix.)

The New York Court of Appeals construed the statute and the policy declared in its enactment as demonstrating that it is meant to bestow a public benefit upon all school children in grades 7 through 12, and held that a program aimed at improving the quality of education for all such children in the state is a matter of legitimate state concern.

The **Everson** case established, if still open to question, that legislation intended to facilitate the opportunity of children to obtain a secular education serves a public pur-

pose. 330 U. S., loc. cit. 7. See, also, **Cochran v. Louisiana State Board of Educ.** (1930), 281 U. S. 370. While this Court was there addressing itself to challenges in the area of due process, the basic truth remains that there is a recognized and legitimate area of concern in the states in the matter of the quality and effectiveness of education and in educational opportunities for every child.

Certain efforts in the area of education may be sufficient for one day and one set of conditions. Different efforts may be appropriate under changed conditions. As this Court has said with respect to the necessity for it to keep a proper perspective concerning the power of the state in the field of public welfare:

> "Changing local conditions create new local problems which may lead a state's people and its local authorities to believe that laws authorizing new types of public services are necessary to promote the general well-being of the people. The Fourteenth Amendment does not strip the states of their power to meet problems left for individual solution * * *" 330 U. S., l. c. 6.

As this Court is aware, more knowledge has accumulated since World War II than in any prior century. Much of the present gross national product of our nation is directly related to industries which are based on scientific discoveries made in this generation and much of it quite recently. It is widely accepted that the tempo of change will accelerate. In other times when knowledge was not accumulating at its current pace, the use of out-of-date or marginal textbooks might not be of sufficient concern for a state to undertake a program designed to put quality textbooks in the hands of all students, public or non-public. However, the necessity for all students in a viable, developing, progressive, technical society to have the benefit of textbooks embracing the latest knowledge and employing the best of modern teaching techniques can now

be a matter of compelling state concern. It is submitted that such thinking is apparent in New York's textbook law and that the secular legislative basis for the law is clear.

3. The primary effect of the law is not to advance religion.

The classic statement of Justice Black in **Everson**, 330 U. S., l. c. 15-16, setting forth the meaning of the "establishment of religion" clause, furnishes the broad general test:

> "* * * the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa * * *".

New York's statute does not set up a church. It does not aid any particular religion or prefer one religion to another, since the textbooks are available upon request of any school child, regardless of his particular religious affiliation or lack of any. No person is influenced to go to or to stay away from any church or to profess any belief or disbelief in any religion. There is no punishment for entertaining or professing a religious belief or disbelief.

There remains, therefore, the question whether New York's statute, in a constitutional sense, aids all religions and whether any tax monies are levied to support any religious activities or institutions.

Those who assert an affirmative answer to these questions predicate their argument on the basis that the furnishing of textbooks to the children thereby aids the school and the religious organization sponsoring the school.

In the case of the New York statute, it should be noted (1) that the books are supplied by way of loan only to individual pupils on request and (2) that before the enactment of the present law it was the individual parents of children in religiously-affiliated schools who supplied the books at their own expense.

The Legislature did not have as its objective aid to institutions. The obvious basic purpose of the Act is to put into the hands of the student, on a non-discriminatory basis, the necessary secular educational tool, the textbook. One stated assumption of the legislature is that not all students have available the proper, necessary tool for learning and such fact is leading to a disparity in the educational experience of such students. Any benefit to the school attended by the student is collateral and so held the Courts of Appeals of New York.

As this Court held in **Everson**, not every form of assistance to a parochial school child or to the parents of such a child constitutes aid to the school the child attends. And appellants and supporting amici specifically remove from their attack certain forms of state aid, such as, hot lunches, eye and dental check-ups, vaccinations and the like, on the basis that such are solely aid to the child. This concession is made notwithstanding the fact that if the state did not provide such assistance the parochial school or the parent would have to provide the same benefit and notwithstanding the fact that the success of the

teaching program in the parochial school may be advanced by reason of the improved health and absence of hunger among the students.

It is submitted that the distinction which appellants seek to draw between those concededly legal public welfare programs affecting religiously-affiliated schools and the New York Textbook Loan Program is an artificial distinction unsupported by the decisions of this Court. The principle uniformly applied in such cases as **Cochran, Everson** and **Schempp,** is that a statute will not be held to contravene the Establishment Clause if a secular legislative purpose is in fact fulfilled and there is no primary effect advancing religion. The provision of textbooks under New York's statute clearly meets this test. The selection and distribution of the textbooks are the responsibility of the public authority, the school board. The product is secular, namely, school textbooks approved by the public, secular authority. The product cannot be diverted from its state-intended purpose, i. e., the provision of secular, academic materials to the student. The statute is "neutral" toward religion and church-related schools, government being neither the adversary nor the sponsor of religion.

CONCLUSION.

It is respectfully submitted that this Court should sustain the order of the Court of Appeals of the State of New York.

Respectfully submitted,

JAMES P. BROWN,
515 Olive Street,
St. Louis, Missouri 63101,
Attorney for The Lutheran
Church-Missouri Synod,
amicus curiae.

SUPREME COURT, U. S.
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OCTOBER TERM, 1967

No. 660

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and

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH and BARBARA BRENNAN, *Intervenor-Appellees*.

BRIEF FOR AMICI CURIAE

National Catholic Educational Association
Lutheran Education Association
National Union of Christian Schools
National Conference of Yeshiva Principals

Of Counsel:

F. X. GALLAGHER
Baltimore, Maryland

ALFRED L. SCANLAN
Washington, D.C.

HARMON BURNS
Washington, D.C. 20036

CHARLES M. WHELAN
Fordham Law School
140 West 62nd Street
New York, N.Y. 10029

W. R. CONSEDINE
1312 Massachusetts Ave., N.W.
Washington, D. C. 20005

Attorneys for Amici Curiae

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Torcaso v. Watkins, 367 U.S. 488 (1961) 8
Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961) 8
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New York Education Law, section 701, subdivision 3, 16 McKinney's Consol. Laws of New York § 701.3 *passim*

BOOKS AND ARTICLES:

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Himmelfarb, *Church & State—How High a Wall?*, 42 COMMENTARY 23 (1966) 5

Howe, THE GARDEN AND THE WILDERNESS, 117-18, 130-31, 137-39, 172-76 (1965) 5

Kauper, *Church and State: Cooperative Separation*, 60 MICH. L. REV. 1 (1961) 5

Kurland, RELIGION AND THE LAW 7-10, 111 (1962) 5

Murray, WE HOLD THESE TRUTHS 143-54 (1960) 5

NCWC Legal Department, *The Constitutionality of the Inclusion of Church-Related Schools in Federal Aid to Education*, 50 GEO. L. J. 397, 411, 437-42 (1961) 5

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THE WALL BETWEEN CHURCH AND STATE (Oaks ed. 1963) 5

U.S. Dept. of Health, Education, and Welfare, *Memorandum on the Impact of the First Amendment to the Constitution upon Federal Aid to Education*, 50 GEO. L. J. 349, 365-81 (1961) 5

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BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACH, SAND LAKE and NORTH GREENBUSH, RENSSELAER COUNTY and CHATHAM, COLUMBIA COUNTY and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3, TOWNS OF NORTH HEMPSTEAD and OYSTER BAY, NASSAU COUNTY, NEW YORK,

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and

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BRIEF FOR AMICI CURIAE

National Catholic Educational Association
Lutheran Education Association
National Union of Christian Schools
National Conference of Yeshiva Principals

INTEREST OF THE AMICI CURIAE

The *amici curiae* are national nonprofit educational organizations. They are dedicated to fostering and promoting the principles and ideals of American edu-

cation. They are also dedicated to fostering and promoting the principles and ideals of the American Constitution. In particular they do not want to see the wall of separation between Church and State either dismantled or displaced.

The *amici* are intensely aware that it is their character as religious institutions that is at the heart of the appellants' challenge to the eligibility of almost half-a-million children to participate in the New York textbook-loan program. These children attend the kind of schools represented by the *amici*. Appellants would have the Court think of these schools simply as Sunday schools or as mere catechetical instruments of various denominations. It is the interest of the *amici* to defend themselves and their students against this constitutional caricature.

The *amici* would be the last to deny that their schools impart religious education and formation. That is one of the two principal reasons for their existence. But the other reason is to furnish the basic secular education any child must have to take his place in civil society. Indeed, in most instances, the schools represented by the *amici* organizations not only meet but surpass the standards of secular education specified by the compulsory education laws. There is no constitutional reason why children who attend such schools should be denied participation in general State programs for the improvement of secular educational opportunities.

Forty-three years ago, with the assistance of this Court, two private schools in Oregon vindicated their own constitutional right to exist and the constitutional right of parents to select such schools for the education

of their children.[1] It is the hope of the *amici* today, with the assistance of this Court, to vindicate the right of parents to exercise their constitutional freedom of choice without forfeiting their rights and their children's rights to participate in general State programs of secular educational assistance.

The wall of separation is a wall between Church and State, not between the child and the State. It is in no sense a wall *around* the child in a Catholic, Protestant, Jewish or other denominational school. In the spirit of that conviction, the *amici* submit this brief in support of the judgment of the Court of Appeals of New York.

CONSTITUTIONAL AND STATUTORY PROVISIONS.

The clauses of the Constitution drawn in question in this case are the Due Process Clause of the Fourteenth Amendment and, owing to their incorporation in the Fourteenth Amendment, the No Establishment and Free Exercise Clauses of the First Amendment.

The statute involved in this case is Section 701, subdivision 3 of the New York Education Law, as amended, 16 McKinney's Consol. Laws of New York § 701.3. The text of the statute, together with an official explanation of it by Counsel for the Education Department of the University of the State of New York, is set forth in the Brief for Appellants.

STATEMENT OF THE CASE

Since the facts of the case and the decisions of the courts below are carefully reported in the briefs of the parties, the *amici* adopt the statements of the case in those briefs.

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[1] Pierce v. Society of Sisters, Pierce v. Hill Military Academy, 268 U.S. 510 (1925).

QUESTION PRESENTED

The formal questions presented in this case are accurately set forth in the briefs of the parties. In the view of these amici, however, the crux of the case can best be summarized as follows:

Whether precisely because they attend schools

> that furnish as much or more
> than the secular education
> specified by the compulsory education laws
>
> but also furnish religious education
> in a way and of a type
> not permissible in the public schools,

children in grades 7 to 12 who attend such schools

are precluded by the Fourteenth Amendment

> in virtue of its incorporation
> of the No Establishment and Free Exercise
> Clauses of the First Amendment,

from sharing in a New York textbook-loan program

for the secular educational benefit

of all school children in grades 7 to 12.

ARGUMENT

By reviewing this case, the Court has embraced an issue that has occupied the best constitutional minds in the country for the last twenty years.[2] Like other landmark decisions, *Everson* v. *Board of Education*, 330 U.S. 1 (1947), settled important constitutional boundaries but left others for future definition. Interestingly enough, none of the cases this Court has decided since *Everson* has touched the nerve of that decision: the extent to which children attending secularly qualified but religiously affiliated schools may be included in general State programs designed to enhance secular educational opportunities for all school children.

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[2] The literature on the subject is, of course, enormous. The two most recent discussions, both set in the context of a general survey of the Court's decisions in Church-State matters, are Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, 80 HARV. L. REV. 1381 (1967), 81 *id.* 513 (1968), and Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L. J. 692 (1968). Among the more notable contributions in the literature of the last ten years are the following: FEDERAL AID AND CATHOLIC SCHOOLS (Callahan ed. 1964); Himmelfarb, *Church & State—How High a Wall?*, 42 COMMENTARY 23 (1966); Howe, THE GARDEN AND THE WILDERNESS, 117-18, 130-31, 137-39, 172-76 (1965); Kauper, *Church and State: Cooperative Separation*, 60 MICH. L. REV. 1 (1961); Kurland, RELIGION AND THE LAW 7-10, 111 (1962); Murray, WE HOLD THESE TRUTHS 143-54 (1960); NCWC Legal Department, *The Constitutionality of the Inclusion of Church-Related Schools in Federal Aid to Education*, 50 GEO. L. J. 397, 411, 437-42 (1961); THE WALL BETWEEN CHURCH AND STATE (Oaks ed. 1963; especially the articles by Drinan, Gordon and Hutchins); United States Department of Health, Education, and Welfare, *Memorandum on the Impact of the First Amendment to the Constitution upon Federal Aid to Education*, 50 GEO. L. J. 349, 365-81 (1961).

After having declined several earlier opportunities,[3] the Court has now decided to take up this matter. As it does so, the Court's caution and sense of delicacy in the past are sure proof of its grasp of the complexities of the issue. Standing in the wings of this case are still other suits designed to test the constitutionality of those sections of the Elementary and Secondary Education Act of 1965 (ESEA) that pertain to children in religiously affiliated schools.[4] Moreover, although not yet formally challenged in court, the constitutionality of the National Defense Education Act of 1958 (NDEA) and of the Higher Education Facilities Act

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[3] Snyder v. Town of Newton, 147 Conn. 347, 161 A. 2d 770 (1960), app. dism. 365 U.S. 299 (1961); Swart v. South Burlington Town School District, 122 Vt. 177, 167 A. 2d 514 (1961), cert. den. 366 U.S. 925 (1961); Dickman v. Oregon School Dist. No. 620, 232 Ore. 238, 366 P. 2d 533 (1961), cert. den. sub nom. Carlson v. Dickman, 371 U.S. 823 (1962); Matthews v. Quinton, 362 P. 2d 932 (Alaska 1961), cert. den. 368 U.S. 517 (1962); Horace Mann League of the United States, Inc., et al. v. Board of Public Works, 242 Md. 645, 220 A. 2d 51 (1966), app. dism. and cert. den. 385 U.S. 97 (1966); Rhoades v. School District of Abington Township, 424 Pa. 202, 226 A. 2d 53 (1967), app. dism. 88 S. Ct. 61 (1967); Worrell v. Matters, 424 Pa. 202, 226 A. 2d 53 (1967), cert. den. 88 S. Ct. 36 (1967).

[4] The relevant sections of Titles I; II and III of ESEA may be found at 20 U.S.C. 241a *et seq.* (Supp. II, 1965-1966). The pending cases challenging the constitutionality of these sections, either in principle or as they are being administered, are: Yurick v. School District of Philadelphia (Court of Common Pleas for Philadelphia County, Pa., No. 6266); Smith v. School District of Philadelphia (Court of Common Pleas for Philadelphia County, Pa., No. 3797); Polier v. Board of Education of New York (Supreme Court of the State of New York, County of New York, No. 19540/1966). See also Flast v. Gardner (United States Supreme Court No. 416); Protestants and Other Americans United for Separation of Church and State, et al. v. United States of America, et al. (U.S. 6th Cir. No. 17918); Carpenter v. Gardner (U.S.D.C. E.D. Pa., No. 42818).

of 1963 (HEFA) is also part of the spectrum of academic issues awaiting judicial resolution.[5]

It is essential, therefore, to keep the issue presented by this textbook-loan case sharply in focus and carefully distinguished from the more general problems posed by such Federal statutes as ESEA, NDEA and HEFA. We are dealing in this litigation with the provision of some secular textbooks to every school child in the State of New York in grades 7 to 12, not with assistance to elementary or college and university students, nor with programs designed to provide scholarships, research grants, laboratory equipment, libraries or academic facilities for nonsectarian instruction.

Everson and the Constitutional Context

Analysis of the decisions which this Court has handed down in the field of Church and State shows that the type of governmental action involved in each case falls into three broad categories:

(1) Governmental action deliberately concerned with religion (E.g., prayer in the public schools);

(2) Governmental action deliberately concerned with the regulation of secular interests but which has obvious and unavoidable religious effects (E.g. Sunday closing laws);

(3) Governmental action deliberately concerned with the provision of welfare and educational benefits to the public and which, therefore, may or may not have a significant effect on religious individuals and institutions, depending upon the personal status of the recipients of the benefits and the organizational status of the cooperating agencies (E.g. contracts with sectarian hospitals).

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[5] NDEA, 20 U.S.C. §§ 421 *et seq.*; HEFA, 20 §§ 701 *et seq.*

In the first category, since religion is the direct object of governmental action, the No Establishment Clause has usually proved to be the determinative part of the Constitution. See, for example, *School District of Abington Township, et al.* v. *Schempp, et al.*, 374 U.S. 203 (1963); *Engel* v. *Vitale*, 370 U.S. 421 (1962); *Torcaso* v. *Watkins*, 367 U.S. 488 (1961); *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952); *Zorach* v. *Clauson*, 343 U.S. 306 (1952); *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203 (1948); *Watson* v. *Jones*, 80 U.S. 679 (1872).

In the second category of cases, the fundamental issue is to what extent government may or must grant exemptions on religious grounds from fundamentally secular laws of a criminal, economic, academic or military nature. Accordingly, the clause that has generally proved determinative in this category of cases is the Free Exercise Clause. See, for example, *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *McGowan* v. *State of Maryland*, 366 U.S. 420 (1961); *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582 (1961); *Braunfeld* v. *Brown*, 366 U.S. 599 (1961); *Gallagher* v. *Crown Kosher Super Market of Massachusetts, Inc.*, 366 U.S. 617 (1961); *United States* v. *Ballard*, 322 U.S. 78 (1944); *Prince* v. *Commonwealth of Massachusetts*, 321 U.S. 158 (1944); *West Virginia State Board of Education* v. *Barnett*, 319 U.S. 264 (1943); *Hamilton* v. *Regents*, 293 U.S. 245 (1934); *Davis* v. *Beason*, 133 U.S. 333 (1890); *Reynolds* v. *United States*, 98 U.S. 145 (1878).

In the third category of cases, the fundamental issue is twofold:

(1) The indirect aid or benefit issue, or to what extent government is precluded from enlisting the as-

sistance of otherwise qualified nongovernmental institutions, precisely because these institutions are also religiously affiliated, for the achievement of secular welfare and educational programs.

(2) The no-discrimination issue, or to what extent the government may or must allow participation to certain individuals in secular welfare and educational programs, regardless of the fact that the only institutions in which these individuals elect to receive or could, as a practical matter, receive the secular benefits are institutions that are both secularly qualified and religiously affiliated.

In this third category of cases, accordingly, both the No Establishment and the Free Exercise Clauses are equally relevant. One forbids aid to religious institutions; the other forbids religious discrimination against individuals. Since religious institutions and religious individuals are inextricably interwoven in our society, any attempt to solve this third category of cases exclusively in terms of one religion clause of the Constitution or the other is doomed to defeat by the Constitution itself. See, for example, *Everson* v. *Board of Education,* 330 U.S. 1 (1947); *Cochran* v. *Louisiana State Bd. of Educ.,* 281 U.S. 370 (1930); *Bradfield* v. *Roberts,* 175 U.S. 291 (1899).

It is unmistakably clear that the precise teaching of the *Everson* case is that both religion clauses of the First Amendment are equally relevant in cases involving the third, or welfare, category of governmental action. The famous and oft-affirmed exposition of the No Establishment Clause (330 U.S. at 15) is followed immediately in the text of the opinion by an equally noteworthy exposition of the Free Exercise Clause (330 U.S. at 16).

What split the majority and the minority in *Everson* was the dissenters' insistence that "No aid, nohow, no

matter what" was the absolute command of the Constitution. If a governmental program resulted in any way in benefit to a religious group, that benefit was automatically and unconditionally fatal to the constitutionality of the program. There was, indeed, one exception: If a church was on fire, the firemen were allowed to put it out, not to save the church, but to save the neighboring nonreligious property (cf. 330 U.S. at 60-61). With that single exception, the constitutional prohibition on aid to religion—direct, indirect, proximate, remote, substantial or paltry—was absolute. In the words of Mr. Justice Rutledge:

> "Legislatures are free to make, and courts to sustain, appropriations only when it can be found that in fact they do not aid, promote, encourage or sustain religious teaching or observances, be the amount large or small" (330 U.S. at 52).

The majority in *Everson* took a different tack, a tack to which this Court has consistently hewed ever since. The No Establishment Clause does, indeed, forbid all purposeful promotion of religion, but the Free Exercise Clause also forbids denying individuals, because of their religion or lack of it, the right to participate in secular welfare and educational benefits. The majority in *Everson* construed safe transportation to school as a secular benefit because it was "indisputably marked off from the religious function" of the church-related schools (330 U.S. at 18). The State was under no obligation to make this benefit available to children not attending the public schools, but it was within the discretion of the State to extend it, in the interest of the general welfare, to all children who were attending schools that met or surpassed the standards set by the compulsory education laws (330 U.S. at 16).

The Need for Constitutional Development

Even this brief analysis of the *Everson* decision and of the categories of Church-State cases decided by this Court makes it clear that the religious guarantees of the First and Fourteenth Amendments are simple only on their face. The No Establishment and Free Exercise Clauses are self-executing but not self-elucidating. The religious and social complexities of our pluralistic American society have inevitably necessitated elaborate glosses on the constitutional text. In the construction of these glosses, history, logic, custom and the "felt necessities of the times" have all had their part to play.

The reason the Constitution of 1789 still lives is because this Court has kept constitutional law alive. There has been neither radical rupture with the past nor ossification in precedent. For development's sake alone, the appellants' case must fail. When all is said and done, they rely on a single paragraph—indeed, a single sentence—of the *Everson* decision.[6] They rely on it in the sense in which the dissenters, not the majority, would have agreed with it. The Constitution is too complex for the appellants' approach.

While the doctrine of *Everson* is not enough for the appellants to prevail, neither is it enough for the appellees. There is, indeed, much in the *Everson* decision to support the constitutionality of the New York textbook program. It must be conceded, however, that as clear and fundamental as the *Everson* principles are, their simplicity demands close analysis and further elaboration before they can be applied to the complex patterns of religious activity in the United States.

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[6] "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion" (330 U.S. at 16).

The famous paragraphs in *Everson* explaining the No Establishment and Free Exercise Clauses will always remain the bedrock of American constitutional law. As, however, the decisions of this Court concerning Sunday closing laws and religious exercises in the public schools conclusively show, a great deal more than what *Everson* has to say needs to be said for the proper resolution of the relationships between organized religion and the government. This is not surprising, since so many Church-State issues were not involved or discussed in that case.

For example, it simply is not possible, using only the unadorned *Everson* concepts and principles, to deal adequately with such complicated matters as tax exemptions for religious institutions, Federal aid to all accredited colleges and universities, the expansion of community hospital faclities through the Hill-Burton Act, and the public provision of chaplains in our armed forces, penitentiaries and hospitals. Neither is it possible, using only the unelaborated *Everson* concepts and principles, to deal adequately with the constitutional problems raised by the New York textbook-loan law now before the Court.

It is the suggestion of the organizations filing this *amicus* brief that, in the field of governmental aid to education, American constitutional law needs to put the emphasis on academic and personal freedom. The No Establishment Clause, of course, strongly supports this emphasis. In addition to its indispensable role of keeping Church and State separate, the clause has its own irreplaceable part to play in the cause of academic freedom. In areas, however, where there is a dynamic tension between the no-aid principle of the No Establishment Clause and the no-discrimination principle of the Free Exercise Clause, the enhancement of aca-

demic and personal freedom should provide the decisive weight. In the instant case, there can be no doubt that, all things considered, academic and personal freedom are best served by sustaining the New York textbook-loan law.

Academic and Personal Freedom

Academic freedom has many facets: the freedom of the faculty to teach, of the students to learn, and of the institution to operate. Academic freedom also involves the right of the government to support education. This support can be given by secular means for secular purposes in many different ways, and particularly, as in this case, directly to students. The entry, however, of the government into the support of education immediately raises new problems of academic freedom: the range of permissible regulation of educational institutions; the problem of avoiding the establishment of a political or religious orthodoxy in the schools totally operated by the government; and the designing of programs of public assistance so that governmental support of education does not mean that the government swallows education.

For most students and many of their parents, personal freedom is intimately linked to academic freedom. So much time is spent in school today, and the economic and social future of a child is so closely related to his performance in school, that it may be fairly said that for children of grammar and high school age, academic freedom is one of the most important constituents of personal freedom. Academic freedom is also important to the parents of these children. Education is the primary responsibility and right of the parents, and there can be no variety or choice in education without a high degree of academic freedom for

the schools, the faculties, the students, the government and the parents.

At the grammar school and high school level, about 85 percent of American parents elect to send their children to public schools. For some the choice is dictated by economic necessity; for others—and probably for most—the choice is the result of the dominant American preference for the type of schooling given in the public schools. The other 15 percent, however, of American parents elect to send their children to nonpublic schools, and within this group more than 90 percent elect religiously affiliated schools. Most of the parents who make this choice fall neither in the ranks of the poor nor the ranks of the rich. The value-judgment that leads them to assume the enormous additional financial burden of educating their children outside the public school system is the conviction that compartmentalizing the secular and religious education of children distorts the nature of man and the universe.

The question now before this Court is whether that conviction and choice of the parents forces the State to disqualify those parents and their children from any public educational assistance whatsoever. In short, does the Fourteenth Amendment impose an "All or Nothing" system on the States? Does the Fourteenth Amendment allow the States to assume the total cost of secular education in the public schools, but forbid even a farthing for carefully limited forms of secular assistance to those parents and children unwilling to accept the type of education to which the government is confined in the public schools Does the Constitution compel the States to make the constitutional right to go to a school that interrelates religious and secular education the most expensive academic freedom in America?

It seems to these *amici* that there is nothing in our constitutional or academic traditions to require such a result. In support of that view the following considerations are offered.

State Compulsion Justifies State Assistance

What the State can compel, the State can facilitate. But the State of New York can and does compel parents to send their children in grades 7 to 12 to schools that meet or surpass certain basic standards of secular education. Therefore the State can, by secular means, assist the parents and children to meet the State-imposed secular standards in the schools of their choice.

It is not permissible, of course, for New York to seek to accomplish secular purposes by religious means. The No Establishment Clause forbids that. But the fact that a law has religious effects does not make the law a religious means. The Sunday Closing Law Cases demonstrate that.[7] For a program authorized by law to fall into the category of a religious means to a secular end, the program must make use of the instruments, methods or paraphernalia of religion. The New York textbook-loan law does not do so. The books are secular textbooks in secular branches of knowledge. If a child can convert the program into a religious program by using the book in a religio-secular school, the child can convert the public library into a religious institution by using the library books in the same school.

The Law Has No Religious Effects of Itself

Any religious effect the textbook-loan program has is the result of an individual citizen's choice, not the

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[7] McGowan v. Maryland, 366 U.S. 420 (1961); Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 599 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961).

choice of New York. If there were no parents in New York who had decided to send their children to religio-secular schools, there would be no religious effects from the law at all.

When a State is providing assistance to everyone in a certain category, the secular character of the State's program must be judged by what the State does, not by what individual recipients of the assistance do. It would be ridiculous, for example, to assert that the Social Security law results in unconstitutional aid to religion because some of the recipients of the assistance make donations from it to the churches of their choice. A prophet can make a public park his pulpit, but he does not thereby convert the government into a church.

When a State truly accomplishes important secular objectives by methods that eschew religious techniques and trappings, the fact that some individuals elect to utilize the State benefits in religio-secular institutions should not raise insuperable constitutional difficulties. The responsibility for the religious ramifications rests with the individuals involved. There is nothing in the Constitution of the United States that says individual citizens are under an obligation to make certain that secular benefits they receive from the government do not redound in any way to the harm or benefit of religion.

No Government Penalty for Exercise of Constitutional Rights

Under the holding in *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925), parents have a constitutional right to select a private nonsectarian or religiously affiliated school that meets the secular standards of the compulsory education laws. *Amici* have already urged upon the Court that there is nothing in our constitutional or academic traditions to necessitate a holding that parents, by exercising this constitutional right, forfeit their

and their children's other constitutional right to participate in general State benefits of a secular character.

Assuredly, by electing to send their children to a school that is both secularly qualified and religiously affiliated, parents deliberately waive their right and opportunity to have their children's education provided entirely without cost (other than the taxes the parents may have to pay as taxpayers) by the State. This waiver, however, should not be converted into a waiver of any and all secular benefits provided by the State. As this Court said in the very recent case of *Simmons* v. *United States,* 36 U.S. Law Week 4227, 4231-32 (March 18, 1968):

> "The rule adopted by the courts below does not merely impose upon a defendant a condition which may deter him from asserting a Fourth Amendment objection—it imposes a condition of a kind to which this Court has always been peculiarly sensitive. . . . A defendant is 'compelled' to testify in support of a motion to suppress only in the sense that if he refrains from testifying he will have to forgo a benefit, and testimony is not always involuntary as a matter of law simply because it is given to obtain a benefit. However, the assumption which underlies this reasoning is that the defendant has a choice: he may refuse to testify and give up the benefit. When this assumption is applied to a situation in which the 'benefit' to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created. Thus, in this case Garrett was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another."

The pressures to which Garrett was subjected in his efforts to protect his liberty were far greater than those imposed on parents by the loss of State aid if they elect to send their children to religio-secular schools. Accordingly, *amici* do not argue that the State *must* supply assistance to children in nonpublic as well as public schools. There may be valid economic, administrative or other policy considerations that would lead a State to channel its educational benefits only through public schools. If, however, a State decides to extend secular educational benefits to all children, regardless of the schools they attend, such a decision certainly ought to be within the constitutional discretion of the State.

The argument that a constitutional right to do something is not a constitutional right to do it at public expense misses the point. In view of the history of American law and education, no one could successfully contend that parents have a right to have the State pay for the education of their children in private schools. But appellants' argument goes much deeper than denying the right of such parents to public assistance: it denies their eligibility. Appellants would write into the Constitution a forfeiture clause as equally unwarranted by our traditions as the claim for compulsory assistance to children in private schools.

No Religious Paralysis of Political Power

The First Amendment was designed not only to keep government out of religion, but also religion out of government. If, however, this proposition is construed to mean that any aid to religious institutions invalidates a governmental program, no matter how secular the program is in concept and execution, we

have the paradox that a rule designed to keep Church and State separate results in a religious paralysis on the exercise of political power.

In a country with as great a variety of religions as our own, it is virtually impossible for the government to do anything that will totally avoid benefit or harm to any religious group. Public birth control programs offend many Catholics. State lotteries offend many Protestants. Conscription laws offend pacifists. The list could be prolonged indefinitely, especially if notice were taken of the smaller sects and the more recently created religious groups such as the League for Spiritual Discovery.

A law that resulted in the total suppression of the religious activities of a particular group would certainly be scrutinized most carefully by this Court. Only the most compelling public necessity could justify such a law. Similarly, a law that resulted in making it possible for a religious organization to function independently of the contributions of its members would also be extremely suspect. Perhaps some extraordinary public crisis could justify such governmental involvement for a short time, but it could never be the order of the day.

Considerably less scrutiny is necessary, however, where the harm or benefit to religion that results from a dominantly secular law is not of a magnitude to suppress a particular religious group or to enable it to carry on its religious functions independently of the voluntary support of its members. In order to accomplish important secular programs, the government has to be given some leeway. Merely making a particular religion easier or more difficult to practice should not be an infallible touchstone of governmental power.

This is all the more true where, owing to the interweaving of religious and secular structures in our society, it simply is not possible for government to achieve its secular purpose of benefiting its citizens without some collateral facilitation of the functioning of religio-secular institutions. Since 15 per cent of all American school children are in nonpublic schools and have a constitutional right to stay there, government cannot possibly assist the secular education of those children without collaterally enhancing the secular dimensions of the schools they attend. It is fruitless to attempt a divorce between the student and the school. The government's right to reach the student necessarily involves the right to have some limited dealings, involving collateral benefits or burdens, with the school that the student attends.

The only benefit that results to religious institutions from the textbook-loan law is an incidental benefit that could not have been avoided consistently with the accomplishment of the secular purpose. Moreover, the benefit is clearly not of a magnitude to make it possible for the religiously affiliated schools in New York to carry on their religious functions independently of the voluntary support of their members. In such circumstances, there is no reason to hold that the collateral benefit to religious institutions invalidates the textbook-loan program.

Contacts Between Public and Religious Authorities

Where the New York statute is properly administered, the institutional contacts between religious and public school authorities are so routine and ministerial as not to contravene the prohibitions of the No Establishment Clause. It is true that this clause was de-

signed to prohibit at the Federal level the kind of institutional involvement between government and religion that characterized England and the American colonies. The Amendment, however, was certainly not designed to cut off all contact between religious groups and public authority.

The religious and public school authorities are already in substantial contact with each other, owing to State regulation of the nonpublic schools. The textbook statute does not add substantially to that contact. The religiously affiliated schools merely cooperate with the secular authorities at the latter's request. If the public school boards wish to deal exclusively with the students, they are free to do so. If they wish to enlist the assistance of the religiously affiliated schools in administering the program, they are also free to do that.

The kind of involvement that the First Amendment forbids is an involvement that entails a sharing of political or religious power. There is absolutely no shadow of such an involvement in the concept or execution of the New York textbook-loan program.

Comments on the Brief for Appellants

If the appellants' interpretation of *Everson* and the First Amendment is correct, the whole course of American constitutional history in the field of Church and State has been wrong. If the New York textbook-loan law is invalid because it results in some collateral aid to religious institutions, far more fundamental and traditional practices in our society would be cast in jeopardy. One need only think of tax exemptions for religious institutions and of the provision of chaplains in our armed forces, hospitals and penitentiaries.

It is possible, of course, to sustain these traditional features of Church-State relationships in American society without endorsing the New York textbook-loan program. But it is not possible on the basis that the textbook law aids religious institutions and that tax exemptions and chaplains do not. Nor is it possible to declare the textbook law unconstitutional without clouding the validity of far more important educational programs such as the National Defense Education Act of 1958, the Higher Education Facilities Act of 1963 and the Elementary and Secondary Education Act of 1965.

It is true that the present case involves only the provision of some secular textbooks to school children in New York. The context and background of the case, however, present a broad spectrum of constitutional issues. These issues do not have to be—indeed they should not be—settled in this litigation, but neither should they be totally ignored.

Appellants would settle all the issues on the basis of a single, simplistic slogan. The complexity and variety of the issues, however, suggest that the intention of the Founding Fathers, the development of American constitutional law, and the realities of modern American religious pluralism all demand a more thoughtful constitutional analysis.

In addition to their No Establishment argument, appellants claim that the Free Exercise Clause protects them against being taxed for the propagation of religious opinions in which they do not believe. The short answer to this is that the Establishment Clause protects them against being taxed even for the propagation of religious beliefs they wholeheartedly accept. The textbook statute, however, is not an expression of support for any religious opinion whatsoever by the State of

New York. Every school child in the State in grades 7 to 12 receives the textbooks. If any religion is aided, so are all religions and non-religions. Any religious effect of the statute is totally the result of an independent and constitutionally protected choice by the parent of a child.

Appellants confuse the fact that it is somewhat easier for all schools, including religiously affiliated schools, to operate as a result of the New York statute with something that is altogether different: an expression of support by New York for religious schools as such. If the mere passage of the law puts New York on the side of the schools attended by the children who benefit by the textbooks, then New York is officially on record as being 85 per cent in favor of public schools and 15 per cent in favor of nonpublic schools. Such a construction of the statute is patently untenable.

There is, however, a deeper danger to the appellants' argument that the Constitution protects individuals against governmental expenditures in support of opinions with which the individuals disagree. Personal opinions are protected against governmental punishment, not governmental disagreement. The government, of course, has no authority to espouse any religious position whatsoever. But if the government is to function effectively in the secular domain, it must be free to support programs (and the political ideas behind those programs) over the objection of dissenting taxpayers. Moreover, owing to the variety of religions in the United States, it may well be that a program conceived by the government and most of the citizens as secular will be regarded by some groups as distinctly religious or anti-religious. If the taxpayer's conscientious objection to a governmental expenditure is given the power of a constitutional veto, we will have adopted

"a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and state." Cf. *McGowan* v. *Maryland,* 366 U.S. 420, 445 (1961).

Appellants urge that giving assistance to religiously affiliated schools will provide a basis for State regulation of such schools. It seems incredible that appellants are not aware of the considerable extent to which nonpublic schools are already regulated by the States. Governmental authority over such schools derives from society's right to insist upon a basic secular education for every child of school age. It is frivolous of appellants to assert the *possibility* of governmental regulation of non public schools as a bar to secular State assistance to parents who choose secularly qualified and religiously affiliated schools for their children.

CONCLUSION

It is respectfully submitted that, in the interest of academic and personal freedom, the judgment of the Court of Appeals of New York be affirmed.

Respectfully submitted,

CHARLES M. WHELAN
Fordham Law School
140 West 62nd Street
New York, N.Y. 10029

W. R. CONSEDINE
1312 Massachusetts Ave., N.W.
Washington, D. C. 20005

Attorneys for Amici Curiae

Of Counsel:

F. X. GALLAGHER
1100 One Charles Center
Baltimore, Maryland

ALFRED L. SCANLAN
734 15th Street, N.W.
Washington, D.C.

HARMON BURNS
1785 Massachusetts Avenue, N.W.
Washington, D.C. 20036

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 660

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACK, SAND LAKE AND NORTH GREENBUSH, RENSSELAER COUNTY AND CHATHAM, COLUMBIA COUNTY AND BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3, TOWNS OF NORTH HEMPSTEAD AND OYSTER BAY, NASSAU COUNTY, NEW YORK,

Appellants,

—v.—

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York,

Appellee,

—and—

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH, and BARBARA BRENNAN,

Intervenor-Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF INTERVENOR-APPELLEES

PORTER R. CHANDLER
1 Chase Manhattan Plaza
New York, N. Y. 10005

WILLIAM B. BALL
212 State Street
Harrisburg, Pa. 17101

Attorneys for Intervenor-Appellees

RICHARD E. NOLAN
JEROME M. CONGRESS
FRANCIS J. MORISON
JAMES J. MACKRELL
DAVIS POLK & WARDWELL
of Counsel

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Opinions Below

The majority and dissenting opinions in the New York Court of Appeals are reported at 20 N.Y.2d 109, 228 N.E. 2d 791, 281 N.Y.S.2d 799 (63a).* The majority and

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* References in parentheses are to the pages of the Joint Appendix unless otherwise indicated.

concurring opinions in the New York Supreme Court, Appellate Division, Third Department, are reported at 27 A.D.2d 69, 276 N.Y.S.2d 234 (45a). The opinion of the New York Supreme Court, Albany County, is reported at 51 Misc.2d 297, 273 N.Y.S.2d 239 (29a).

Constitutional and Statutory Provisions Involved

Constitution of the United States, Amendment I: Establishment of Religion and Free Exercise of Religion Clauses;

Constitution of the United States, Amendment XIV: Due Process and Equal Protection Clauses;

Section 701, subdivision 3, New York Education Law, as amended L. 1965, C. 320; L. 1966, C. 795, 16 McKinney's Consol. Laws of New York, § 701.3 (See Supplement A to this brief, pp. S 1-4).

Question Presented

The New York Legislature, for the declared public purpose of maintaining quality education in secular subjects which all public and private school pupils are required under New York law to study, has enacted a statute providing for the free loan of secular-subject textbooks approved by the public school authorities to all children enrolled in grades seven to twelve in any school—public or private—which complies with the State compulsory education law. The textbooks are loaned upon request to individual students, not to their schools, and those requesting students are made personally accountable for the books.

This litigation poses a single issue:

> The State having enacted such a statute for the general public welfare, does the Establishment Clause require the State to exclude from the educational benefits of that statute those children—and only those children—who attend religiously-affiliated schools?

Statement of the Case

Chapter 320 of New York Laws of 1965 (effective September 1, 1966) amended Section 701 of the New York Education Law to provide that boards of education shall have the power and duty to lend textbooks "designated for use in any public, elementary or secondary schools of the state or . . . approved by any boards of education, trustees or other school authorities" * . . . "upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law . . ." (See Supplement A to this brief, pp. S 1-4, for full text.) A further amendment made by Chapter 795 of New York Laws of 1966 provides that such textbooks shall be loaned to children in public and private schools "on an equitable basis", and sets top limits on the amounts which any school district is required to expend ($15 times the number of children enrolled in all schools for each year up to 1969, and $10 thereafter). This amendment also defined a "textbook" as a book "which a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends."

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* The statutory definition of "school authorities" in Educ. L. §2(12) makes it plain that this phrase means the *public* school authorities.

Subdivisions 6 and 7 of the Act (Supplement A to this brief, pp. S 3-4) provide for State reimbursement to school districts of sums expended for textbooks supplied to pupils under the Act.

The statute has been implemented by an official opinion of the Counsel to the Education Department* which emphasizes that the textbooks must be secular:

> "a. The textbooks [must] be non-sectarian (this eliminates denominational editions and those carrying the 'imprimatur' or 'nihil obstat' of a religious authority)." (Opinion of Counsel No. 181, ¶6 (July 8, 1966), issued by State Education Department.) (See Supplement B to this brief, pp. S 6-7)

The statute has been authoritatively construed by the New York Court of Appeals to require that the textbooks be secular. 20 N.Y.2d at 117, 228 N.E.2d at 794-95, 281 N.Y.S. 2d at 805 (67a).

The textbooks must be loaned to the individual pupils, who are held accountable for them, and not to any school. (Opinion of Counsel No. 181, ¶7; Supplement B, p. S-7)

The Textbook Loan Act embodies the New York Legislature's recognition that availability to all children of quality education in secular subjects is a matter of pressing public concern. The preamble declaring the Legisla-

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* On January 10, 1966 the Education Department issued a memorandum of tentative "suggestions for administration of the program," which is referred to in the amicus curiae brief of the American Jewish Committee, et al. (pp. 43-48). Subsequently, however, authoritative official guidelines were issued by the Education Department in its Opinion of Counsel No. 181, and it is this subsequent controlling opinion which is cited both in this brief and in the brief for appellants.

ture's purposes in enacting the amendment to Section 701 states:

> "Section 1. Statement of policy. The security and welfare of the nation require the fullest development of the mental resources and skills of its youth. This calls for more adequate educational opportunities and increased efforts to educate more of the talent of our nation and requiring the correction of those imbalances in our educational programs which have led to an insufficient proportion of our population educated in the fields of *science, mathematics, foreign languages and other non-sectarian subjects.* The Congress of the United States has reaffirmed the principle that the states and local communities retain primary responsibility for public education. *It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state.*" N. Y. Sess. Laws 1965, Ch. 320, §1. (emphasis added)

In this action plaintiffs sought a declaratory judgment against the Commissioner of Education of New York that the Textbook Loan Act is on its face contrary to the New York State Constitution and to the Establishment Clause* of the First Amendment *only* "in so far as it provides for the purchase of textbooks with public moneys for free loan to pupils attending religious schools" (Complaint, ¶16 (6a); *cf.* "Questions Presented" in appellants' brief, p. 3).

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* The complaint nowhere mentions the Free Exercise Clause.

Plaintiffs do not claim that the statute is unconstitutional in so far as it provides for the loan of books to pupils attending either (i) public schools or (ii) non-religiously-affiliated private schools.*

The intervenor-defendants are the parents of children residing in the East Greenbush School District and attending Catholic parochial schools pursuant to the compulsory education law. Before the Act, all of those parents (and others similarly situated) had purchased at their own expense the textbooks which their children had been using (14a). Under the new Section 701, those children are entitled to, and are receiving, secular textbooks under loan as provided in that Section.

Both the Commissioner and the intervenor-parents served answers asserting the constitutionality of the Textbook Loan Act. The Commissioner interposed a defense that under State law the plaintiffs had no standing to sue. The intervenor-parents took no position on the issue of standing to sue, but raised affirmative defenses alleging that to forbid the loan of secular textbooks to children in lawful attendance under the compulsory education laws at private schools conducted under religious auspices, while permitting the loan of such textbooks to children attending other private schools not under religious auspices, would be an interference with the free exercise of religion, a denial of the [illegible]al protection of the laws, and a denial of liberty and p[illegible] without due process of law, contrary to the First, F[illegible]ourteenth Amendments to the Con-

* Latest av[illegible]ures from the State Education Department indicate that t[illegible] presently some 246 non-religiously-affiliated private school[illegible] State, with a total of over 42,000 pupils.

stitution of the United States and corresponding provisions of the State Constitution (24a-26a).

All parties moved for summary judgment. The Supreme Court, Albany County, ruled that plaintiffs had standing to sue under New York law, and ruled in favor of plaintiffs on the merits (29a-42a; 51 Misc.2d 297, 273 N.Y.S.2d 239 (1966)). The Appellate Division, Third Department, reversed, holding that plaintiffs lacked standing to sue (45a-47a; 27 A.D.2d 69, 276 N.Y.S.2d 234 (1966)). Although three of the justices in the Appellate Division found it unnecessary to rest their decision on the merits because of their determination that the plaintiffs lacked standing to sue, all five Appellate Division justices were unequivocal in their opinion that the statute contravened neither the New York nor the United States Constitution (45a, 47a-60a; 27 A.D.2d at 71, 75-80, 276 N.Y.S.2d at 237, 241-46).

The Court of Appeals reached the merits, holding that the statute was a constitutional exercise of the Legislature's authority to provide for the secular education of all children within the state, and did not contravene either Article XI, Section 3 of the New York Constitution or the First Amendment to the Federal Constitution (63a-68a; 20 N.Y.2d 109, 228 N.E.2d 791, 281 N.Y.S.2d 799 (1967)). The Court dealt first with constitutionality under Article XI, Section 3 of the New York Constitution, which prohibits use of state money, property, or credit "directly or indirectly, in aid or maintenance" of any church-related school. The Court held that, since the Textbook Loan Act was designed not to aid religion either directly or indirectly but to benefit all school children by improving their secular education, "any benefit accruing to . . . [religiously-affiliated] schools is a

collateral effect of the statute, and, therefore, cannot be properly classified as the giving of aid directly or indirectly" (66a; 20 N.Y.2d at 116, 228 N.E.2d at 794, 281 N.Y.S. 2d at 804). The Court noted the essential similarity of the textbook loan program to the activities of public libraries, which routinely loan books to parochial school students for use as aids in their course work without any suggestion that the state is thereby providing unconstitutional aid to religiously-affiliated schools.

The Court observed that:

> "No one in the last third of the 20th Century can doubt that a program aimed at improving the quality of education in all schools is a matter of legitimate State concern ...
>
> "At a time when we have large-scale Federal and State aid to education, it is justly feared that children who are denied these benefits may receive education inferior to children in public schools. Unless certain types of aid can be made available to *all* children, we run the risk of creating an educational lag between children in public and private schools" (66a-67a; 20 N.Y.2d at 116-17, 228 N.E.2d at 794, 281 N.Y.S.2d at 804).

For the same reasons the Court held that there was no violation of the First Amendment:

> "The State makes no affirmation of religious beliefs or activities within the public schools. Section 701 remains completely neutral with respect to religion, merely making available secular textbooks at the request of the individual student and asking no question

about what school he attends. Despite the flexibility of the English language, it is impossible to conclude that loaning nonreligious textbooks to all students, including those who attend a parochial school, establishes a religion or constitutes the use of public funds to aid religious schools. (cf. *Everson* v. *Board of Educ.*, 330 U. S. 1, 16, 18.)

"As a practical matter, to deny private school children the benefit of the State aid provided by section 701 could widen the gap between those children in deprived areas who attend parochial schools and those attending public schools in the same areas who receive the benefits of all the many and necessary programs backed by the massive resources of both State and Federal Governments" (67a-68a; 20 N.Y.2d at 117-18, 228 N.E.2d at 794-95, 281 N.Y.S.2d at 804-05).

The dissenting judges in the Court of Appeals, while stating that it "is by no means clear" that the statute does not violate the Federal Constitution, did not come to the conclusion that it did (68a, 71a-76a; 20 N.Y.2d at 120, 228 N.E.2d at 796-97, 281 N.Y.S.2d at 807).

Summary of Argument

In 1965 the State of New York, faced with an indefinitely expanding educational crisis, enacted the Textbook Loan Act as a response thereto. The means were well designed to achieve the end. Prior to the Act, the free loan of textbooks, at public expense, to New York's public school children was on a local option basis, while the State's non-public school children—over 20% of the total school population—received no such loan. The result was that a great number of school children were using worn or outdated textbooks or had none at all. This problem was especially acute in the large urban centers of New York, with their multi-racial complexion and poverty-distressed areas.

The Act in the first year of its operation has been a contributing force in helping to stem the tide of educational deterioration in the State. In the school year 1966-67 textbooks were supplied under the Act to both public school children and non-public school children, most of the latter attending religiously-affiliated schools highly regulated by the State to assure adequate secular education.

Appellants attack the Act, under the Establishment Clause of the Federal Constitution, because of its inclusion of these latter children among all the students who are its beneficiaries. On this ground they ask this Court to terminate the textbook benefits of the Act for this particular group of New York's school children, and for them only. They attack the Act on its face and not in its application.

Appellants' extreme position lacks both a factual foundation and a constitutional basis under the rationale of prior decisions of this Court which support the validity of the Textbook Loan Act.

In *School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963), this Court, carrying forward the teachings of its prior decisions respecting both Free Exercise and Establishment, enunciated a test which recognized the "competing demands" of these concepts, and the fact that "the line which separates the secular from the sectarian in American life is elusive". 374 U.S. at 231. The Court's test is directly applicable to welfare legislation which extends general public benefits to individuals served by religious agencies. This test does not permit solution of serious problems relating to social welfare and religious liberty by simplistic slogans of "church-state separation" or "child benefit". Rather it permits the Court to weigh factual situations on a case-by-case basis to determine whether in fact the legislation fulfills a "secular legislative purpose" and whether in fact it has a "primary effect that neither advances nor inhibits religion" (374 U.S. at 222). That test is applicable here.

The facts of this case, as set forth in the Statement of the Case and analyzed in Point I of this brief (pp. 3-9, 13-28), amply demonstrate that the Act, in its educational benefit not only to public school pupils but to all pupils, including those in religiously-affiliated schools, effectively carries out a vital public purpose. Appellants base their main argument upon the contention that the Act supports religious institutions. Under this Court's decision in *Cochran* v. *Louisiana State Board of Education*, 281 U.S. 370 (1930), applied to the facts of this case, no benefit to any institution, religious or otherwise, results within the meaning of the Constitution. The public is the beneficiary.

This Court's later decision directly on the Establishment Clause issue in *Everson* v. *Board of Education*, 330

U.S. 1 (1947), lends no support to the contention of appellants but on the contrary gives strong support to that of intervenor-appellees. *Everson's* classic definition of church-state separation is in no wise offended by the Act, which neither calls for nor permits support of religion, religious activities or institutions. *Everson's* careful discussion of the nature of "welfare" legislation, and its holding that the Establishment Clause does not bar a child attending a religiously-affiliated school from participating in the benefits of general welfare legislation enabling him to get a secular education, plainly points to the constitutionality of the Act.

In the light of the facts of this case, there can be no doubt that the Textbook Loan Act fulfills a secular legislative purpose. Ignoring this significance of the Act, appellants seek to persuade this Court to take judicial notice of a mass of unproved assertion and speculation which they present as argument that the Act, despite its secular legislative purpose, has a primary effect that advances religion. Both the facts of this case and the First Amendment cases decided by this Court contradict appellants' contention.

The New York Textbook Loan Act is not unique, and the weight of authority of the highest state courts is on the side of constitutionality of the Act.

Finally, appellants now say (although they did not mention it in their complaint) that the Act violates the Free Exercise Clause. Plainly, it does not. If there is a Free Exercise issue in this case, it is that which would result from the termination, as to one particular class of school children involved, of the general benefits provided by the Act and now enjoyed by all children.

I.

The State of New York Determined That the Act, With Its Controls, Fulfills a Major Public Purpose

The preamble to the Textbook Loan Act (*supra*, p. 5) states the judgment of the New York Legislature that the Textbook Loan Act serves critical public needs and expresses important public policy respecting the education of youth. This judgment will be highlighted by examination into the facts of New York's educational crisis and a description of how the Act, embodying detailed public controls, responds to that crisis.

The Educational Crisis

The questions presented by this case are of paramount importance because of the crucial role of education in the United States today.

In his 1965 State of the Union address, President Johnson said:

> "Every child must have the best education that this Nation can provide." 111 Cong. Rec. 26, 28 (Jan. 4, 1965).

In his Education Program Message of January 12, 1965, President Johnson emphasized the relationship between a high level of education and the achievement of basic individual and community goals:

> "One hundred years ago, a man with 6 or 7 years of schooling stood well above the average. His chances to get ahead were as good as the next man's. But today, lack of formal education is likely to mean low wages, frequent unemployment, and a home in an urban or rural slum.

Poverty has many roots but the taproot is ignorance."

• • •

"Nearly half the youths rejected by Selective Service for educational deficiency have fathers who are unemployed or else working in unskilled and low-income jobs."

• • •

"The burden on the Nation's schools is not evenly distributed. Low-income families are heavily concentrated in particular urban neighborhoods or rural areas. Faced with the largest educational needs, many of these school districts have inadequate financial resources." 111 Cong. Rec. 499, 500.

Government programs to improve education result from the significant relationships between inadequate education and unemployment, poverty, and crime and from "educational implications inherent in technological developments and the relation of education to national preparedness." See S.Rep. No. 146 on the Elementary and Secondary Education Act of 1965, 89th Cong., 1st Sess., p. 1 (1965). Such programs are designed not only to help eliminate clear social evils such as poverty but also to assure that all students in this country receive an education that will encourage and enable them to make full use of their capacities.

This Court has itself recognized and stimulated the expanding importance of education in the United States in the second half of the twentieth century. In *Brown* v. *Board of Education,* 347 U.S. 483 (1954) the Court declared:

> "Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." (347 U.S. at 493)

This Court's declaration reflects the fact that provision for adequate elementary and secondary education for all students is today considered just as essential to the public welfare as health and safety legislation. This heightened recognition of the crucial role of education in modern society has led to a significant expansion of state and federal aid to education because of the inability of local governmental units to meet the financial burden imposed by present and future educational requirements. Thus, in 1925-26, the total New York State public-school education budget was $210,987,750, of which 75.1% came from local taxes; 20.6% from State aid, and 4.3% from all other sources. In 1964-65 (the latest year for which published figures showing the breakdown in aid are available), the total public-school budget had soared to $2,564,866,871, of which 55% came from local taxes, 42% from State aid, and 3% from all other sources. Annual Educational Summary New York State 1964-65, Table 20, at 30 (1967). In 1966-67 the State educational budget rose to $3,241,000,000, of

which the State provided 45.6%. Univ. of State of N.Y., Bureau of Statistical Services, *Education Statistics Estimates* 1967-68, Table 7 (1967) [hereinafter *Educ. Statistics*]. The financing of education at nonpublic schools, both those which are under religious auspices and those which are not, comes almost entirely from the contributions of parents to the schools their children attend. In consequence —as the New York Court of Appeals pointed out (*supra*, p. 9)—children attending such schools in economically disadvantaged areas have suffered, and must suffer increasingly in the future, in comparison with public school children in the same or other areas, who have available the massive resources of both the State and the Federal governments.

Despite expansion of state and federal aid the nation is in crisis respecting the cost of educating its young. While school populations continue to rise, so do educational costs. In 1929-30 it cost approximately $135 to educate a child in the New York public schools. For 1967-68 the estimated figure is $1,082.* While inflation threatens a geometrical escalation of educational costs, the rising expectations regarding education's potential for the nation's future bring into view wholly new projected costs. While demands for improvement of American education become more intensive—particularly under the lengthening shadow of the problems faced by the nation's cities—legislators ponder how to maintain even the educational status quo.

Nowhere in the United States has the education crisis been on larger scale than in the State of New York, where

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* Univ. of State of N.Y., *Education Statistics New York State*, 12 (1968).

4,140,000 students are enrolled in public and private elementary and secondary schools. Since 1950 the state expenditures from all sources for elementary and secondary schools have risen from $616,184,000 to $3,241,000,000, or an increase of 450%. Projected increased expenditures show a rise to $4,245,000,000 in 1970 and $5,561,000,000 in 1975.* This financial crisis has particularly affected New York's major urban centers, which are population magnets drawing increasing numbers of people from elsewhere in the state and from out of state, and adding to the financial problems of both public and nonpublic schools.

A major element in New York's educational system is, and for many years has been, its nonpublic schools. In 1966, the year in which the Textbook Loan Act became effective, 891,146 New York children or 21.5% of the total state enrollment attended these schools.** The critically important part of the public burden carried by nonpublic (including religiously-affiliated) schools is especially significant in grades 7-12, the grades affected by the textbook loan program. In seven major urban centers of New York State, nonpublic secondary schools serve the following percentages of the total high school population: Albany 49.6%, Syracuse 33.7%, Buffalo 32.1%, Rochester 29.3%, New York City 26.8%, Utica 23.7%, Schenectady 19.5%.***

One of the major public needs which the Legislature sought to meet through the Act was to improve the qual-

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* Hogan, *Perceptives in Financing Public School Expenditures During the Period 1967-77* (1968).

** *Educ. Statistics,* Table I.

*** Enrollment data derived from Reimbursement Request Form (ST-1) submitted by individual school districts to Division of Educational Finance, 1967.

ity of education in the major urban centers of the State. The failure of major cities to provide adequately for textbook needs is indicated by the fact that before the Act in many of these cities the burden of textbook cost for *public* (as well as nonpublic) school pupils was borne by parents.*

New York City has provided a particularly disturbing illustration of the critical need for textbook aid to children in all schools. Concern for textbook availability and quality in that city has been reflected in the constant introduction during the years 1960-1966 of bills in the Legislature to provide New York City with special textbook aid.**

Textbooks have been described as "the good red blood that feeds the brain and strengthens the muscles of the educational process,***" and as the "universal" and "dominant" teaching tool.† There can be no doubt of the central role which textbooks play in education. President Johnson in his Education Message of 1965 stated:

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* While complete statistics are not available, it is known that prior to the 1965 amendment a substantial number of communities in New York were not supplying free books to public school pupils either by loan or grant. This was true in such major urban centers as Syracuse, Binghamton, Elmira, Rome, Utica, Troy, and Schenectady.

** Sen. No. 2135 (1960); Ass. No. 2794 (1960); Ass. No. 3620 (1961); Sen. No. 1291 (1962); Ass. No. 1511 (1962); Ass. No. 2886 (1963); Ass. No. 2048 (1964); Ass. No. 3380 (1965); Ass. No. 1061 (1966); Ass. No. 1068 (1966); Ass. No. 1311 (1966).

*** Lawrence G. Derthick, former United States Commissioner of Education, in a Speech Before the 1960 Meeting of the American Textbook Publishers Institute.

† Black, *Automation Still in Future,* Annual Education Review, New York Times, Jan. 12, 1968, p. 74, col. 2.

> "The explosion of knowledge and the rapid revision of curriculums in the schools has created new demands for school textbooks. The obsolete text can suffocate the learning process. Yet the cost of purchasing textbooks at increasing prices puts a major obstacle in the path of education—an obstacle that can and must be eliminated." 111 Cong. Rec. 499, 500.

While statewide textbook distribution rose by an estimated one-third between 1964-65 and 1965-66, bringing New York State from 21st to 7th place in the United States in per pupil expenditure for textbooks,* the effect of the Act has been especially strong in New York City. There, textbook expenditure for pupils in grades 7 through 12 rose from $3,050,000 in 1964-65 to $7,519,018 for 1966-67. The following figures strikingly bring home further evidence of the beneficial social impact of the Act in meeting the urban crisis:

TEXTBOOK EXPENDITURES 1966-67**

Total for State	$19,213,342
Total for 16 largest cities of State	9,845,205
Total for New York City	7,519,018

As the cost of education and the number of school children have increased, the availability of state and federal aid for the benefit of children attending private schools

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* *Textbook Data for American Textbook Publishers Institute (1967)*, "Textbook Sales by State or Other Destination, Domestic Student Enrollment Per Capita."

** *State Aid for Elementary and Secondary Education in New York, 1966-1967.*

as well as for public school children has become a necessity of state and federal programs. Serious financial and administrative problems—to say nothing of legal and moral factors—make it highly undesirable for the Legislature to ignore the need for adequate education in the nonpublic as well as the public sector. It is clear that in New York—as elsewhere—the cost of attempting to incorporate students attending private schools into the public school system, as opposed to making available to them limited participation in some of the benefits of publicly-controlled programs for the welfare of all children, would be prohibitive. As Charles H. Silver, President of the Board of Education of the City of New York, testified before the General Subcommittee on Education of the House of Representatives:

> "It is quite obvious that the staggering problems and complexities involved in organizing, financing, and operating the largest school system in the world would indeed be greatly increased, if it were not for the private and church-related schools, which provide the education for such a large segment of elementary and high school youth in New York City. They are, and have been for generations, partners of the public schools in this great work of education. These nonpublic schools presently enroll approximately 450,000 boys and girls—a total slightly less than one-half of the number of 960,000 enrolled in public schools. Thus, one out of every three children in New York City of elementary and high school age attends a nonpublic school.

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If New York City were confronted with the situation whereby 450,000 additional children came into the public school system, this would entail a capital outlay of $1 billion for the construction of school buildings.

If New York City were responsible for the maintenance and operation costs of educating an additional 450,000 pupils, it would increase the cost to the city by approximately $200 million each year.

Aside from this staggering sum of money which would have to come from public taxes, the public school system would have the problem of obtaining the services of additional properly qualified teachers in the face of a present national shortage. A total of 18,000 new teachers would have to be employed. This represents approximately one-half of the total teachers presently employed in our New York City school system.

This staggering financial burden would be multiplied scores and scores of times, if local and State governments throughout the Nation had the responsibility of providing educational programs and facilities for all children now enrolled in nonpublic elementary and high schools. It is estimated that these institutions, with a total enrollment of 7 million pupils, save local and State governments an expenditure of more than $3 billion annually in operational and maintenance costs. An expenditure of approximately $16 billion would have to be made from public funds to provide buildings to house this student population." Hearings on H.R. 4970 Before the Gen'l Subcomm. on Educ. of the House Comm. on Educ. and Labor, 87th Cong., 1st Sess., 324-25 (1961).

Appellants are simply wrong in claiming that the cost to the public of limited educational benefits to private school students such as secular textbook loans would be the same as the cost of incorporating such students into the public school system (Br. 38). The cost of loans to nonpublic school pupils under the Textbook Loan program for 1967-68 is $5,093,000, or 19.7% of the total cost of the program, and .015% of the total state education budget. See *State Aid for Elementary and Secondary Education in New York, 1966-67*, 44.

The Act Responds to the Crisis

The Legislature's effort to respond in an adequate and practical manner to the education crisis in New York could scarcely be successful if it had excluded from help the one out of every five students in New York attending nonpublic schools. To relieve critical needs in education and yet to avoid transgressing constitutional prohibitions on public aid to religion, the Legislature has provided a carefully limited, publicly controlled program of loaning secular subject textbooks to qualified pupils in all schools.

The New York Legislature recognized many years ago that textbooks are a necessity of adequate secular education and in consequence provided for textbook aid to indigent children. In 1934 the Legislature enacted a statute (L. 1934, c. 638, now embodied in Educ. L. § 3209), which provided:

> "Public welfare officials, except as otherwise provided by law, shall furnish indigent children with suitable clothing, shoes, *books*, food and other necessaries to enable them to attend upon instruction as hereinbefore required by law." (emphasis added.)

The Attorney General of New York in 1935 rendered a formal opinion that the benefits of this statute must be extended to *all* children on public assistance in all schools, including parochial schools. Citing *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925), he said

> "Compulsory education is the rule in this State. Such education may properly be afforded by parochial as well as by public institutions.
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> • • • • •
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> It may also be noted that the parochial schools are in substance *public* in character also." (emphasis in original.) 1935 Report of Attorney General, 381.

Thus, since 1934 in New York State, indigent children attending both public and nonpublic schools (including religiously-affiliated schools) have been entitled to receive supplementary assistance grants in order to pay for textbooks as well as other special expenses such as lunches, bus fares, gym clothing, etc.*

The language of this statute, in bracketing textbooks with public welfare items such as "clothing, shoes, food and other necessaries", is not without significance.

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* The State Department of Welfare (now the Department of Social Services) has promulgated regulations to implement the 1934 Act. The regulations include "school expenses" as part of the personal budget of a family on relief. The regulations also add

> "(d) *Expenses incident to education.* (i) In addition to the allowance for school expenses included for school age children in the monthly allowance schedule, the cost of such special items as transportation, lunches, activity fees, *textbooks,* locker fees and gymnasium clothing shall be met for children regularly attending school." (emphasis added).

18 New York Codes, Rules and Regulations [N.Y.C.R.R.] 352.4 (b)(2), 352.5(d).

Before the passage of the 1965 Textbook Loan Act, the indigent-pupil provision of the 1934 Act just cited was the only mandatory requirement for the furnishing of textbooks in New York. In all other cases, the decision whether to provide free textbooks to public school children was left under Educ. L. § 703 to the voters of individual school districts. Contrary to the statement at page 13 of the amicus brief of the American Jewish Committee, et al., it had not been the "universal" practice in the pre-1965 period to provide free textbooks even to public school students.*

By the change effected through the Textbook Loan Act, New York abandoned the prior system of local option which had led to marked differences in treatment of children in different areas, and mandated free textbook loans to all pupils in grades 7 through 12 throughout the state, abolishing as to those children the indigence requirement of the 1934 Act. The inclusion of children in nonpublic (including religiously-affiliated) schools as beneficiaries of this general legislation, paralleled the enactment at the national level of the Elementary and Secondary Education Act of 1965, 79 Stat. 36 (1965) as amended, 80 Stat. 1199, 20 U.S.C. §§ 821-27 (Supp. II, 1965-66) which provides in Title II for the furnishing of free, publicly approved textbooks to pupils in both public and nonpublic schools. There, too, the secular legislative purpose was manifest. As the Report of the House Committee on Education and Labor stated:

> "The committee believes not only that there is widespread lack of library resources, textbooks, and other instructional materials in our elementary and secondary schools, but also is convinced of the serious con-

* See footnote *, *supra*, p. 18.

sequences to our educational programs in the event there is a failure to fill this need." H.R. Rep. No. 143, 89th Cong., 1st Sess. 11 (1965).

The Act Provides Requisite Public Controls

Through the Textbook Loan Act, the New York Legislature has attempted to advance the secular education of pupils at all schools by designing its program to meet the secular needs of all children rather than the particular interests of any school.

In the first place, students may not receive religious or sectarian books. The Act forbids the loan of textbooks unless they are "designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities." The New York Court of Appeals has construed the statute to provide for the loan of secular texts only (67a; 20 N.Y.2d at 117, 228 N.E.2d at 794-95, 281 N.Y.S.2d at 805), and this opinion is in accord with prior administrative interpretation. (See Opinion of Counsel quoted at p. 4, *supra*.) The Act is further limited in that it excludes reference books, novels and other fiction, being centered upon specific secular educational goals. (Op. of Counsel No. 181, ¶4; Supplement B, p. S-6).

In the second place, the loans are governed by explicit public controls. Ownership remains in the school district and is to be "indicated in or on each book by labels or other appropriate methods of identification." (Op. of Counsel No. 181, ¶16a; Supplement B, p. S-14) By the express and clear language of the Act, the program is a "loan" program, not a "gift" program. "All books remain the property of the school district *and must be treated as*

such." (¶16a; Supplement B, p. S-14) Administrative action to convert the loans into grants would be in violation of the Act. The character of the loan program is underscored by the power of school boards to make rules and regulations for reimbursement to the district by students in public and private schools for damage, loss or destruction of loaned textbooks. (§ 701(3) of the statute; Op. of Counsel No. 181, ¶7; Supplement B, p. S-7. See also Supplement C, pp. S 16-19 for sample of school district regulations and textbook application form.)

Furthermore, the books are loaned not to schools but to the individual students. Each student must individually request the books loaned to him:

> "Under the statute, both the power and the duty to purchase and loan textbooks depend upon individual requests to the school board for such textbooks." (Op. of Counsel No. 181, ¶12; Supplement B, p. S-10)

Additional elements of the textbook loan program show that its purpose is to benefit individual pupils rather than schools. Books are furnished by the board of education for the district where the student resides, not where the student attends school (§ 701(3); Op. of Counsel No. 181, ¶8b; Supplement B, p. S-8). With respect to private school pupils, loans may only be made to those children enrolled in schools "which comply with the provisions of the Compulsory Education Law, i.e., which provide at least substantially equivalent educational services and facilities . . . as the public schools of the district of location provide." (Op. of Counsel No. 181, ¶8a; Supplement B, pp. S 7-8)

Wholly ignoring the obvious enhancement of the secular education of all children at public and private schools and

the concurrent benefit to the public welfare, appellants argue that the loan to students is "fictional" and that ownership of the books is really in the schools. This claim is totally inconsistent with the statutory requirements and administrative regulations outlined above, which demonstrate that the purpose of the Act and its practical effect are to provide secular textbooks for students at all schools, and not to provide books in aid of any school, religiously affiliated or otherwise.

Public Recognition and Regulation of Nonpublic Education in New York

Organization and jurisdiction of the New York Education Department

The organization of the educational system in New York State is in many respects unique. Unlike many States where the public educational system is headed by an appointed or elected Commissioner of Education with limited powers, in New York all education, both public and private, is subject to the jurisdiction and control of the Regents of the University of the State of New York. The Regents are a corporate body composed of 15 members elected for staggered terms by joint ballot of the Legislature (Educ. L. § 202).

(i) Under New York law (Const. Art. XI, § 2; Educ. L. § 101) the Regents are the head of the *State Education Department.* Their administrative arm is the Commissioner of Education, defendant in this case. The Commissioner and Deputy Commissioner are appointed and removable by the Regents (Educ. L. § 101). All other officers and employees of the Education Department are appointed

and removable by the Commissioner subject to the approval of the Regents (Educ. L. §§ 102, 104, 105).

(ii) Under Educ. L. § 202 the Regents are also the governing body of *"The University of the State of New York."* • This is not a university in any conventional sense. It has neither a campus, a faculty nor a student body of its own. Its composition is defined in Educ. L. § 214 entitled "Institutions in the University":

> "The institutions of the university [i.e. 'The University of the State of New York'; cf. definition in Educ. L. § 2(3)] shall include all secondary and higher educational institutions which are now or may hereafter be incorporated in this state, and such other libraries, museums, institutions, schools, organizations and agencies for education as may be admitted to or incorporated by the university. The regents may exclude from such membership any institution failing to comply with law or with any rule of the university."

Under Educ. L. § 207 the Regents are granted broad "legislative functions" in the entire field of education, both public and private. The only subject excluded from their control under § 207 is "the entire course of religious, doc-

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• The "University of the State of New York" in this form has been in existence under the Regents since 1784. Despite the similarity of name, it must not be confused with the "State University of New York", which is an entirely separate institution founded in 1948, and which is a conventional publicly-maintained university, consisting of a number of colleges and graduate schools scattered throughout the State outside New York City (cf. Educ. L. § 350 et seq.). The comparable public institution within New York City is the City University of New York (Educ. L. § 6202 (1)). The State University and the City University have their own boards of trustees, and as parts of "The University of the State of New York" are under the over-all supervision of the Regents.

trinal or theological instruction" in seminaries for the training of the clergy.

The effect of this provision is to include within "The University of the State of New York" all public and private high schools and colleges within the State which meet the Regents' standards.

In addition to their general powers under § 207 the Regents have these further specific powers and duties:

(i) To visit, inspect, and require reports from, all institutions of education, public and private, within the State (§ 215).

(ii) To charter, on such terms as they may prescribe, all institutions in the field of education, including not only schools and colleges, but also libraries, museums, teachers' associations, etc. (§ 216).

(iii) To suspend or revoke the charter of any such institution, public or private (§ 215, 216, 219).

Under § 218 their consent is required before any institution, public or private, can set up a department of education or give degrees.

The net effect of all these sections is to place the control and supervision of all educational institutions, public and private, under the jurisdiction of the Regents and their administrative arm, the Commissioner of Education.

Extent of public regulation and recognition of nonpublic education

Within the statutory framework thus outlined, New York has long recognized the public importance, and the necessity of public supervision, of adequate secular education

at private schools within the State. Nonpublic schools, including both those which are religiously affiliated and those which are not, are recognized by law as part of the educational system of the State. As such, they are extensively regulated by the public authorities in such matters as attendance, curriculum, inspection, and accreditation. Only those schools which meet the requirements laid down by law and by the regulations of the State Education Department are recognized as complying with the compulsory education law. This is in full accordance with the two basic rules laid down by this Court in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925):

> (i) "No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare." (p. 534)
>
> (ii) ". . . The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only." (p. 535)

Attendance at private schools which do not meet the State's requirements will not be recognized as compliance with the compulsory education law; and a parent who insists upon sending his child only* to such an unrecognized

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* Provided the requirements of the compulsory education law are being met, a parent can of course send his child anywhere for whatever additional schooling he desires.

school can be prosecuted for non-compliance with that law. The basic test in each case is whether the instruction given outside the public school is, in the words of Educ. L. § 3204(2):

> "at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides."

This statute has been interpreted and enforced, and the basic test of substantial equivalency applied, in several reported cases. Instruction was held "substantially equivalent" in *People* v. *Turner,* 277 A.D. 317, 98 N.Y.S.2d 886 (4th Dept. 1950); *Matter of Myers,* 203 Misc. 549, 552, 119 N.Y.S.2d 98, 101 (Domestic Relations Ct., N.Y.Co. 1953); *Van Allen* v. *McCleary,* 27 Misc. 2d 81, 211 N.Y.S. 2d 501 (Sup. Ct., Nassau Co. 1961). Instruction was held *not* "substantially equivalent" in *People* v. *Donner,* 199 Misc. 643, 99 N.Y.S.2d 830 (Domestic Relations Ct., Kings Co. 1950), *aff'd,* 278 A.D. 705, 103 N.Y.S.2d 757 (2d Dept. 1951), *aff'd,* 302 N.Y. 857, 100 N.E.2d 48 (1951), *app. dism. per curiam,* 342 U.S. 884 (1951); *Matter of Weberman,* 198 Misc. 1055, 100 N.Y.S.2d 60 (Sup.Ct., Kings Co. 1950), *aff'd,* 278 A.D. 656, 102 N.Y.S.2d 418 (2d Dept. 1951), *aff'd,* 302 N.Y. 855, 100 N.E.2d 47 (1951), *app. dism. per curiam,* 342 U.S. 884 (1951); *In re Conlin,* 130 N.Y.S. 2d 811 (Children's Ct., Nassau Co. 1954).

The following are some of the principal respects in which nonpublic schools are regulated under New York law:

(i) *As to attendance*

Educ. L. § 3205(1)(a):

> "In each school district of the state each minor from seven to sixteen years of age shall attend upon full time day instruction."

There is an exception for minors who have already completed a full course at high school (§ 3205(2)(a)). Other special provisions cover part-time attendance and evening sessions (§§ 3205(2)(b), 3206 and 3207). Under § 3205(3) certain local boards of education are empowered to raise the required age limit from sixteen to seventeen.

Educ. L. § 3210(2)(a) provides that minors who attend upon instruction "elsewhere than at a public school" must attend for at least as many hours and within the hours specified for public school attendance. (Cf. Educ. L. § 3204(4))

Educ. L. § 3210(2)(c) provides that holidays and vacations for nonpublic schools "shall not exceed in total amount and number those allowed by the public schools". This is subject to an exception provided by § 3210(2)(d) permitting attendance for a shorter school day or for a shorter school year

> "provided, in accordance with the regulations of the state education department, the instruction he receives has been approved by the school authorities as being substantially equivalent in amount and quality to that required by the provisions of part one of this article."

Educ. L. § 3211 requires the teacher of every minor pupil, no matter what school he attends, to keep records

of attendance and absence and to produce such records upon demand by any duly authorized representative of the public school authorities. The principal of every school which any minor attends must give prompt notification in writing to the local public school authorities, with full details, of the discharge or transfer of any minor from attendance at his school.

(ii) *As to curriculum*

The basic curriculum requirements applicable to both public and nonpublic schools are laid down in Educ. L. § 3204.

§ 3204(1) provides:

> "1. Place of instruction. A minor required to attend upon instruction by the provisions of part one of this article may attend at a public school *or elsewhere.* The requirements of this section shall apply to such a minor, irrespective of the place of instruction." (emphasis added)

§ 3204(2) provides:

> "2. Quality and language of instruction; text-books. Instruction may be given only by a competent teacher. In the teaching of the subjects of instruction prescribed by this section, English shall be the language of instruction, and text-books used shall be written in English. *Instruction given to a minor elsewhere than at a public school shall be at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides.*" (emphasis added)

§ 3204(3)(a)(1) lays down the basic curriculum for grade schools and explicitly requires that pupils receive instruction in various secular subjects as follows:

> "3. Courses of study. a. (1) The course of study for the first eight years of full time public day schools shall provide for the instruction in at least the twelve common school branches of arithmetic, reading, spelling, writing, the English language, geography, United States history, civics, hygiene, physical training, the history of New York State and science."

§ 3204(3)(a)(2) provides for high schools:

> "(2) The courses of study and of specialized training beyond the first eight years of full time public day schools shall provide for instruction in at least the English language and its use, in civics, hygiene, physical training, and American history including the principles of government proclaimed in the Declaration of Independence and established by the constitution of the United States."

While the two subsections just quoted by their terms refer to "public day schools", they must be read, and have been interpreted by the courts, as applicable to private schools as well, under the "substantially equivalent" requirement of § 3204(2). *People* v. *Donner; Matter of Weberman,* both cited *supra* p. 31.

§ 3204(3)(2)(e) provides:

> "The state education department shall have power to alter the subjects of instruction as prescribed in this section."

Beside the basic curricular requirements prescribed by §3204, other sections of the Education Law contain further requirements which are specifically made applicable to both private and public schools. In some instances, the statute adds that if any private school fails to furnish the prescribed instruction, then

> "attendance upon instruction in such school shall not be deemed substantially equivalent to instruction given to pupils of like age in the public schools in the city or district in which such pupils reside."

These additional requirements include:

(i) "Courses of instruction in patriotism and citizenship" (§801(1))

(ii) Courses in the "history, meaning, significance and effect" of the Declaration of Independence and the Constitutions of the United States and New York (§801(2))

(iii) Physical training for all pupils over eight years old (§803)

(iv) Instruction in highway safety and traffic regulation (§806)

(v) Fire drills (§807) and instruction in fire prevention (§808).

(iii) *As to accreditation*

As noted above (pp. 27-29) the Regents have broad powers as to the chartering, visitation, supervision and accreditation of all institutions of learning, both public and private. Specifically as to accreditation, the following additional provisions should be noted:

Under Educ. L. § 208 the Regents are given power to award Regents' diplomas and to prescribe Regents' examinations.

Under Educ. L. § 209 the Regents are *required* to establish "in the secondary institutions of the university [i.e. all public and private high schools], examinations in studies furnishing a suitable standard of graduation therefrom *and of admission to colleges . . .*". Accordingly, in addition to compliance with the curriculum requirements above outlined, all secondary schools in New York must be "registered" or "admitted" with the Regents, if they are to enjoy the benefits of full participation in The University of the State of New York. These benefits include (a) the right to give Regents' examinations, (b) the right to issue Regents' diplomas, (c) full recognition of its credits and diploma at any other school or college within "The University of the State of New York", public or private.

(i) *Registration.* The Regents have issued rules governing "registration", or "admission". 8 N.Y.C.R.R. 3.30, 3.31. (See Supplement D, pp. S20-21 for text.) "Registration" is the term applied by the Regents to the act under which secondary schools, both public and private, become subjected to supervision and inspection on a regular basis. It is the equivalent of the more widely known term, "accreditation". The Commissioner of Education has issued regulations detailing the procedure and requirements for registration of any secondary school. It is important to note the various standards which are imposed, including courses of study, sequence, hours and days, teacher qualifications, teacher work-load (class size), location, construction and equipment (see Supplement E, pp. S22-25 for text).

(ii) *Diplomas.* A registered secondary school—public or private—is granted the privilege of administering Regents' examinations for the issuing of a *state* high school diploma upon proof that the student has "satisfactorily passed examinations in the *subjects prescribed* for the completion of an *approved* four year course". (See Supplement F, pp. S26-29 for copy of diploma and form of State record sheet reciting the subjects covered.) It is to be noted that the legal issuer of the diploma, pursuant to Educ. L. § 209, is "the Regents" (*i.e.*, the public authority). The diploma is signed by the Commissioner of Education over the seal of "The University of the State of New York".

(iii) *Secular significance of diploma.* In common with the diploma issued to a graduate of a public high school, the identical diploma issued to the graduate of a religiously-affiliated high school provides the evidence of educational qualification for numerous public employments. Therefore, whatever else the graduate of a religiously-affiliated high school may have received in the years of his attendance, he has also received secular education so complete in the eye of the State as to provide him with the full measure of educational qualification established by the State as the standard for the agents who are to achieve its goals in a variety of public employments. Such education in other words, serves a public purpose. The language of the diploma (taken in conjunction with the fact that this same diploma has been issued to millions of graduates of religiously-affiliated and other nonpublic high schools in New York over the past years) constitutes a most exact recognition of the intervenor-appellees' position, that purely secular public purposes

may be and are being fulfilled, under public supervision and regulation, through attendance at religiously-affiliated educational institutions.

II.

The Act Fulfills a Secular Legislative Purpose and Has a Primary Effect That Neither Advances Nor Inhibits Religion

The Act Fulfills a Secular Legislative Purpose

From the foregoing it is clear that the Textbook Loan Act fulfills a secular legislative purpose:

1. The Act answers critical public, or secular, needs in education in the face of an indefinitely expanding educational crisis.

2. The Act provides public controls assuring the achieving of public, or secular, goals in education.

The constitutional significance of showing that legislation attacked on Establishment grounds fulfills in fact a secular legislative purpose is demonstrated by three decisions of this Court, all in the general field of education—*Cochran* v. *Louisiana State Board of Education,* 281 U.S. 370 (1930), *Everson* v. *Board of Education,* 330 U.S. 1 (1947), and *School District of Abington Township* v. *Schempp,* 374 U.S. 203 (1963).

The decisions in these three cases are entirely consistent with each other and interrelated. Each of them illuminates one or more aspects of the issue presented in the case at bar; and taken together they supply a foundation upon which we submit the decision in this case can rest. We shall deal with them chronologically.

(a) *Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930).*

It is true, of course, that *Cochran* raised no issue under the First Amendment. We do not claim that it did. Nevertheless, this Court in *Cochran* unanimously and squarely decided that a statute substantially similar to the New York Textbook Loan Act fulfilled a *secular legislative purpose*. *Cochran* involved (as here) an attack on State legislation permitting the use of public funds to provide secular textbooks to pupils in all schools, public and private, including private schools with a religious affiliation. In *Cochran* (as here) the plaintiffs averred that the purpose of the textbook program was:

> "... to aid private, religious, sectarian, and other schools not embraced in the public educational system of the State by furnishing text-books free to the children attending such private schools." (281 U.S. at 374).

This Court, while not faced with the question whether an establishment of religion was created by the Louisiana legislation, was faced with an intimately related problem: was not the legislation an unconstitutional financing of private (including religious) institutions? The Court, unanimously, per Chief Justice Hughes, held that it was not:

> "The schools ... are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries ... The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private

concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded." *Id.* at 375.

The *Cochran* decision, never overruled or qualified in subsequent decisions of this Court,* has significance for the instant case in two respects. First, the providing, by the public, of secular-subject textbooks to children in parochial schools *is not, within the meaning of the Constitution, aid to the institution.*

Second, the Court held that *a public purpose was served.* While the plaintiffs in *Cochran* did not make an express claim for relief under the Establishment Clause, the Court expressly dealt with their claim in terms of the religiously-affiliated character of the schools involved. The Court's conclusion that the legislation was justified as achieving a *public* purpose therefore becomes significant, not because the Court did not apply the Establishment Clause *but because the Court, consciously and expressly dealing with religiously-affiliated institutions,* nevertheless concluded that the program achieved a *public* (i.e. a *secular*) purpose.

Appellants nevertheless contend that *Cochran* is irrelevant to the determination of the present case, because in *Cochran* the Establishment issue was not before the Court. We submit, however, that the double holding in *Cochran* of (i) a secular legislative purpose and (ii) no institutional benefit to religiously-affiliated schools, is most relevant

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* The *Cochran* case has been cited with approval in *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, 518 (1937) (Stone, J., opinion of the Court); *Everson* v. *Board of Education*, 330 U.S. 1, 7 (1947) (Black, J., opinion of the Court); *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 248 (1963) (Brennan, J., concurring opinion).

here, and is entirely in line with the principles later developed and enunciated in *Everson* and *Schempp*.

(b) *Everson* v. *Board of Education, 330 U.S. 1 (1947)*

In *Everson* the Establishment issue was squarely presented. So also was presented again the Due Process issue dealt with in *Cochran*. In *Everson* plaintiffs urged that a New Jersey statute providing public support of transportation to parochial school pupils violated both constitutional provisions. The Court, considering the Establishment question, laid down the classic exposition of church-state separation to which it has unswervingly adhered. With that expression—set forth in appellants' brief at page 10—intervenor-appellees are in complete accord.

The Court in *Everson* held the challenged program constitutional under both the Establishment and Due Process Clauses. In discussing the due process argument raised in the case, the Court made express mention of *Cochran*, with its textbook program, *and at once bracketed this with bus ride programs* (330 U.S. at 7), which it called "public welfare legislation." 330 U.S. at 16. In its discussion of the due process issue in the case, the Court carefully weighed whether that program was truly in the public interest. In such weighing, the Court, though conscious that First Amendment liberties were raised in the case, paid careful heed to the determinations of the legislature and the highest court of New Jersey that the bus statute served a public purpose, and pointedly noted that "[c]hanging local conditions create new local problems which may lead a state's people . . . to believe that laws authorizing new types of public services are necessary to promote the general well-being of the people." *Id.* at 6-7. The Court not only held that the

bus statute served a public purpose, but did so with the following broad statement identifying the transportation program as an aid to secular education:

> "It is much too late to argue that legislation intended to facilitate the opportunity of children *to get a secular education* serves no public purpose." *Id.* at 7. (emphasis added).

Again emphasizing the important public purpose achieved by the New Jersey program, the Court went on to conclude that the program did not violate the Establishment Clause. As to this latter point, see discussion *infra*, pp. 44, 47-49.

From the "public purpose" portion of the *Everson* decision, the following conclusions directly apply to the instant case:

1. *Everson* recognizes educational need and lends strong support to the view that legislation aiding "secular education" fulfills a public purpose.

2. *Everson*, by necessary implication, holds that "secular education" is afforded in religiously-affiliated schools.

3. *Everson* recognizes that states, for the well-being of their people in the field of education, may continue to evolve "new types of public services" (of which the busing statute was one). The New York Legislature, by the Textbook Loan Act, has evolved a new type of educational service for what it demonstrably believed to be the well-being of the people of New York. With this conclusion the Court of Appeals agreed. As has been shown, the support of secular education, under extensive public controls, is amply achieved by the Act.

(c) *School District of Abington Township* v. *Schempp, 374 U.S. 203 (1963).*

In this case the Court discussed the history of its treatment of legislation which combined public ("secular") purposes and possible effects of a religious nature. Drawing upon the principles it had evolved in past cases, it unified them in the following test:

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. *Everson* v. *Board of Education, supra; McGowan* v. *Maryland, supra,* at 442." (374 U.S. at 222)

This test is not simplistic. It calls for scrutiny in two directions: (i) respecting the actuality and degree of the secular, or public-interest, purpose of the enactment, (ii) respecting the impact of the program in advancing or inhibiting religion. Appellants ignore the public purpose served by the statute. But the Court, in *Schempp,* made it clear that its employment of the term, "secular legislative purpose", not only was deliberate but was intended to constitute an important factor in judging the constitutional issue.

The Court, in *Schempp,* cited both *Everson* and *McGowan* v. *Maryland,* 366 U.S. 420, 442 (1961), at the conclusion of its statement of the aforementioned test. In

Everson (preceded by consistent expressions in *Bradfield, Quick Bear* and *Cochran*),* the Court gave great weight to the facts demonstrating "secular legislative purpose" in legislation attacked on Establishment grounds. Both under the "due process" portion of the *Everson* opinion, and also under its exhaustive examination of Establishment, the Court pointed to and discussed the facts of the questioned bus statute as welfare, or secular-purpose, legislation, concluding that the statute was true "public welfare" legislation as opposed to "religious" legislation. It is in the light of *Everson's* consideration of the secular, public, or welfare aspect of legislation, carried forward into the first part of the *Schempp* test, that intervenor-appellees believe must in part be judged. So seen, it plainly meets the terms of the test because it provides to all students, irrespective of the schools they attend, the tools necessary to obtain a proper secular education as required by New York law and considered by the New York Legislature to be essential to the future well-being of the State and its citizens.

Further confirmation of the importance of the "secular legislative purpose" term of the *Schempp* test is found in the Court's reference in *Schempp* (374 U.S. at 222) to the statement in *McGowan* (366 U.S. at 442) that "the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions". It is true that *McGowan* was a case involving regulation of conduct, not public spending. Yet the principle underlying *McGowan* is close to that of *Everson*. As the Court of Appeals of Maryland, in a case involving tax exemption of churches, recently stated:

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* *Bradfield* v. *Roberts*, 175 U.S. 291 (1899); *Quick Bear* v. *Leupp*, 210 U.S. 50 (1908); *Cochran* v. *Louisiana State Board of Education*, 281 U.S. 370 (1930).

> "As McGowan makes clear, even though the exemption had an unmistakably religious origin, if the present purpose and effect of the exemption is primarily secular, and if those purposes could not reasonably be deemed achievable without an incidental benefit to religious organizations, the 'establishment' clause is not violated." *Murray* v. *Comptroller,* 241 Md. 383, 401, 216 A.2d 897, 907 (1966), *cert. denied,* 385 U.S. 816 (1966).

Unlike the Sunday Closing Laws in *McGowan,* no claim is made here that the New York Textbook Loan Act had a "religious origin"; and the contrary clearly appears from the statement of policy in the preamble to the Act. See p. 5, *supra.*

The allusion, in the *Murray* decision, to "purposes . . . not reasonably achievable without an incidental benefit to religious organization", is significant in consideration of the "secular purpose" argument. The implication is that the Establishment Clause forbids "the use of essentially religious means to serve governmental ends where secular means would suffice". *Schempp, supra,* 374 U.S. at 231 (Brennan, J., concurring). *Torcaso* v. *Watkins,* 367 U.S. 488 (1961), cited by appellants (Br. 11, 23, 27) bears this point out strikingly (*i.e.,* the use of a religious test oath to guarantee responsible service from a notary public). But New York's program here attacked is not merely remote from such misuses of civil authority, but its very opposite. The Textbook Loan Act uses secular means to achieve secular ends in precisely and unavoidably the same sense

that many other public programs (relating in some manner to religious agencies) achieve secular ends.*

If the Act in fact aids the secular education of all children, including those in religiously-affiliated schools, the only "alternative means" to those state-controlled and state-administered means by which this general public benefit is accorded them would be to move children in religiously-affiliated schools *en bloc* into non-religiously affiliated schools—an alternative as prejudicial to their liberty as it would be catastrophic to the public schools and the solvency of the State.

The Act Has No Primary Effect That Advances Religion

The test brought forward from *Everson* and stated in *Schempp* not only calls for a demonstration of secular legislative purpose but also mandates that there must be no primary effect which advances or inhibits religion. Appellants thus misstate our position when they ascribe to us the view "that *Everson* is to be read as saying that any tax measure is valid if the funds are appropriated for a public purpose . . ." (Br. 13). We hold no such view.

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* *E.g.*, G.I. Bill of Rights (Veterans Readjustment Assistance Act of 1952), 38 U.S.C. §§ 1601-69 (Supp. II 1965-66) and the National Defense Education Act of 1958, 72 Stat. 1581, as amended 79 Stat. 1251 (1965), 80 Stat. 1245 (1966), 20 U.S.C. 401-592 (Supp. II 1965-66), which have provided tuition payments and, in the case of the G.I. Bill, payments for textbooks (58 Stat. 289 (1944)) for students attending nonsecular as well as secular universities; National School Lunch Act, 60 Stat. 230 (1946), 42 U.S.C. §§ 1751-60 (1964); Elementary and Secondary Education Act of 1965, 79 Stat. 29, 20 U.S.C. §§ 236-44 (Supp. II 1965-66), New York State Scholar Incentive Program and New York State Regents Scholarship Program, New York Education Law §§ 601, 601-a (McKinney Supp. 1967) (provision of funds for students attending universities under religious auspices), New York Education Law § 3713 (McKinney 1953) (provision of benefits under Federal school lunch program administered by the State to students in nonsecular schools).

The practices struck down in *Schempp, Engel* v. *Vitale*, 370 U.S. 421 (1962), and *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203 (1948) — all of them involving distinctively religious exercises in the public schools—afford obvious examples of programs having a primary effect of advancing religion. Any "secular" effect or benefit claimed in defense of them was solely such effect or benefit as religion itself is deemed to confer. So, too, with the imposed oath-taking in *Torcaso*. These are some examples of activities which the Court intended to be encompassed by the concept "primary effect advancing religion".

While it is also clear that the aforementioned activities do not exhaust the category of activities which may be judged to have a primary effect of advancing religion, they are the only decisions in which this Court has held that such a primary religious effect existed. In the other Establishment cases which it has considered—the two cases which it cited at the conclusion of the statement of its test in *Schempp*—it found that there was no such effect. These cases, *Everson* and *McGowan*, are instructive as to the meaning of "primary effect advancing religion."

In the instant case, as in *Everson*, "the benefits of public welfare legislation" are involved. In each case all school children generally are the beneficiaries of the legislation, and in each case the schools they attend meet "the secular educational requirements which the state has power to impose." The appellants argue (as did the appellants in *Everson*) that the welfare program in question must be enjoined only as to those children attending religiously-affiliated schools. In each case the public program *directly* aids the education of the child in such school. In *Everson*, the Court said that by the bus program "children are helped to get

to church schools" and that the program might, in fact, be the decisive factor in enabling a child to get to such a school:

> "There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares . . . when transportation to a public school would have been paid for by the State." 330 U.S. at 17.

But the Court, in *Everson*, distinctly held that the program there attacked (a program which it described as *"intended to facilitate the opportunity of children to get a secular education"*) did not constitute aid to religion, did not involve the levying of any tax to "support" religious activities or institutions, and resulted in not the *"slightest breach"* of the wall between church and state.

Indeed, to the contrary, the Court posted warning signs that absolutist zeal to press the Establishment Clause to the limits of doctrinaire logic would result in injury to Free Exercise liberties. It warned that a State may not exclude anyone, "because of their faith, or lack of it, from receiving the benefits of public welfare legislation." *Id.* at 16. It said that care must be exercised, "in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief." *Ibid.* It even inferred that denial of the social benefit attacked in *Everson* might constitute a use of the state power to "handicap religions". *Id.* at 18.

Understandably, appellants in their Jurisdictional Statement urged that *Everson* be regarded as lacking vitality—

a position which they have now abandoned. This Court has, over the intervening years, given steadfast recognition not only to the *Everson* definition of "establishment", but also to its holding and entire rationale. See *McGowan* v. *Maryland,* 366 U.S. 420, 443-44 (1961); *School District of Abington Township* v. *Schempp,* 374 U.S. 203, 222 (1963); *Sherbert* v. *Verner,* 374 U.S. 398, 410 (1963). See also *Rhoades* v. *School District of Abington Township,* 389 U.S. 11 (1967).

Appellants, in skirting the *Schempp* test, say that it "contemplates that a law may have more than one primary effect." (Br. 26). If their contention were correct, the Court's use of the adjective "primary" would have been superfluous. But the use of the word "primary" cannot be presumed to have been unintentional or careless. While the Court's citation to *Everson* and *McGowan* provides the best explanation of what it meant by "primary" effect, the predominant dictionary definition also cuts the ground from under the notion of multiple "primary effects" and makes clear that the common meaning is: *"first in importance", "chief", "principal".**

Appellants' speculation over the "likely" meaning of the test obscures the importance of the phrase, "neither advances nor inhibits". Thus there is required to be shown, not merely some indirect relationship to religion, but an effect having the marked positive or negative character of *advancing or inhibiting* religion.

In view of the facts of this case, of the holdings in the prior relevant cases, and the clear prescription of this

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* American College Dictionary, p. 961 (1967); Webster's New International Dictionary (2nd ed.), p. 1963.

Court as to "no primary effect which advances religion", the Act, demonstrably accomplishing a secular purpose, constitutes no establishment of religion.

Appellants' Other Arguments Relating to the "Religious" Effect of the Act Are Unsound

a. *"By furnishing textbooks to sectarian schools, the state enables such schools to purchase religious texts with the money thus saved."* (Br. 7, 17). There is no evidence in this case that parochial schools previously bore the expense of furnishing textbooks to their students. The intervenor parents in this case all paid for their children's textbooks (14a); and the practice in New York, prior to the adoption of the Textbook Loan Act, was to require parents of public-school pupils to pay for their children's textbooks except in communities which had availed themselves of the local option under former Section 701 to furnish textbooks at public expense (*cf.* discussion at pp. 18, 23-24 *supra*). Thus, there is no basis in this record for any finding that the statute effects financial savings to schools enabling them to release funds for any religious purposes.

b. *" . . . the parochial school may order any book designated by any school board. This is an open invitation for any church whose adherents dominate any one of the 800 school districts in New York to see to it that the board of this captive district designates the books which reflect the church's point of view."* (Br. 36). Appellants then escalate this imaginary situation into veritable "holy wars" in which "sect will be pitted against sect". To this there are several answers:

(i) The law forbids *any* school board to issue *any* textbook reflecting any church's particular point of view. See pp. 4, 25, *supra.*

(ii) Appellants' argument is pure speculation as to future events, with nothing in the record to suggest that such events are likely to happen. If any local school board were to attempt any such violation of the law and the applicable regulations, the New York courts and the New York Commissioner of Education would be quick to stop any such hypothetical administrative abuse.* Appellants' *in terrorem* argument misconceives the task of constitutional adjudication which is "the ability and willingness to distinguish between real threat and mere shadow." See *School District of Abington Township* v. *Schempp, supra* at 308 (Goldberg, J., concurring).

(iii) If this branch of appellants' argument were valid, the basic assumptions underlying the entire public school system would be open to serious question. If, as appellants

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* The strictness with which the Commissioner of Education has enforced the First Amendment against local public school authorities is illustrated by several formal decisions of the Commissioner. Thus, even before this Court's 1948 decision in *McCollum,* the Commissioner had banned released-time religious instruction in public school buildings. *Matter of McLennan,* 65 N.Y. State Dept. Reports 56 (1943); *Matter of Cromwell,* 66 N.Y. State Dept. Reports 8 (1945). See also *Matter of Belman,* 78 N.Y. State Dept. Reports 10 (1957). In *Matter of Rubinstein,* 2 Ed. Dept. Rep. 299 (1962) the Commissioner forbade the recitation of the last stanza of the Star Spangled Banner under circumstances indicating that it was being used as a prayer and not as a patriotic ceremony.

The broad scope of the control over local school authorities exercised by the Commissioner in all fields can best be seen by scanning the "Education" section in any volume of the New York State Department Reports. Thus in Volume 78, one of those cited above, the Commissioner, during the year 1958, rendered formal decisions on over 500 appeals against actions taken by local school boards in a wide variety of matters.

also assert, no adequate identification of secular versus nonsecular material can be made (Br. 17) and if this alleged fact will produce a struggle among religious groups for use of materials reflecting their various points of view, then, by the reasoning of appellants, the danger already exists, wholly apart from the present statute. Children in the public schools come from all faiths. On appellants' theory, there is nothing to prevent their parents—regardless of the present statute—from engaging in a power struggle over the choice of textbooks for public-school use only, with the result that the public schools will inevitably be subverted to the service of religion (or non-religion) wherever one group happens to predominate. We submit that such reasoning is compelled by appellants' analysis, and we further submit that it has no basis in experience and clearly no basis in the record.

c. *"There is no such thing as secular education in a sectarian elementary or secondary school."* (Br. 16, 17). This charge, finding no support in the record, is propped up by the equally unevidenced assertion that the textbooks "are used in connection with the teaching of religious tenets and faiths" (*id.* at 7, 17). The charge is answered by the terms of the Act, by the public policy of New York, and by the nature of the modern educational process.

The Act provides only secular textbooks, approved by public authority for use in the New York public schools. The titles of these books are a matter of public record; and appellants make no attack upon any particular book or books. Instead, appellants make the general assertion that "there is no reliable standard by which secular and religious textbooks can be distinguished from each other".

(Br. 15) Carried to its logical conclusion, this would mean that all school textbooks may be inherently dangerous under the First Amendment. Appellants' argument would apply equally to books loaned to public school pupils and to parochial school pupils. But the Act's binding obligation upon all school districts is clear: only nonreligious textbooks may legally be furnished to children in *any* school.

Appellants' argument that the Act can only contribute to religious instruction in parochial schools is squarely contradicted by the fact that the Act actually has the opposite effect. Furnishing students in these schools with secular textbooks results in a replacement of any religiously-oriented texts on the same subjects which such schools are alleged—without record foundation—to have been employing. The net effect of the program, therefore, would appear to be to increase the secular content of instruction in these schools.

The public policy of New York is directly challenged by appellants' accusation that "there is no such thing as secular education" in New York's religiously-affiliated schools. As has been amply demonstrated (*supra,* pp. 27-38), that policy both recognizes and regulates the secular role of New York's religiously-affiliated schools, through the compulsory education law, the requirements of "substantial equivalency" to public schools in instruction, competency of teachers and secular-subject curriculum, and respecting accreditation, diploma issuance and other matters. Appellants' attack upon this public policy constitutes no basis whatever for denying to children enrolled in such schools the loan, for use there and at home, of secular textbooks.

Finally, appellants are answered by the realities of the educational process in all New York education in the 1960's. Parents who send their children to religiously-affiliated schools expect and demand that the latter will receive religious instruction there as a part of a general education. But neither this parental motivation, nor the religious commitment of those who operate these schools,* warrants the conclusion that the free loan of secular textbooks to children in these schools amounts, in the constitutional sense, to support of religion. Apart from formal courses in religion and from specific religious exercises (to which the secular textbooks furnished under the Act are obviously inapplicable), contemporary demands on religiously-affiliated schools relating to class time requirements and notoriously mounting pressures for academic excellence do not permit such schools to be eccentric schools of religiosity as they are caricatured by appellants and their supporting amici. Today's parents of parochial school children demand that that schooling be geared, without quality differentiation, to general educational standards. The influence of standardized tests (*e.g.*, New York Regents, College Entrance Board examinations) is per-

* With particular reference to those nonpublic schools which are under Catholic auspices, the general observation may be made that they are in a process of rapid transformation. This process is characterized by (a) the trend toward democratically elected lay school boards, (b) the increase of lay teachers (nationally now about 50%), (c) the pervasive impact of the Second Vatican Council, with its teachings on religious liberty, ecumenism, human rights and dignity. Appellants cite Mr. Justice Jackson's quotation, in 1947, from Woywod's 1940 commentary on the Code of Canon Law (Br. 15). The Code is presently being rewritten by a Commission for Revision of the Code of Canon Law appointed by Pope John XXIII March 28, 1963 (see NC News Service, April 25, 1964, 18) to bring it into conformity with the teachings of the Second Vatican Council.

vasive. Secondly, many curricular subjects, by their value-closed nature (*e.g.*, mathematics, modern foreign languages, chemistry) obviously do not admit of religious addition or gloss.

There is a limited area of other subjects (*e.g.*, history, social studies) which are naturally related to value-perspectives, and all education—public and private—bears witness to this fact. In this area great caution must be exercised in making broad generalizations, as appellants seek to do, concerning religious inculcation. This Court has been sensitively conscious of the difficulties involved in attempting to sort out ideas, concepts, outlooks or value-configurations as being "orthodoxies" or "religions". One difficulty arises from the fact that "religion" (in the constitutional sense) may exist apart from any sect, organization or body. *Engel* v. *Vitale,* 370 U.S. 421, 430 (1962). The term "religion" embraces belief broadly—not limited to the theistic. *Torcaso* v. *Watkins,* 367 U.S. 488, 495 (1961).* Quite properly public schools present to the impressionable child values and perspectives of reality and human destiny.** In the realm of instruction in value-related subjects, it is no easy task to determine when or to

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* *Accord, Washington Ethical Society* v. *District of Columbia,* 249 F.2d 127 (D.C. Cir. 1957). See generally Stahmer, *Defining Religion: Federal Aid and Academic Freedom,* in 1963 Religion & Pub. Order 127-131.

** ". . . any vital education will inescapably have a share in building the social order of the moment. Proceeding on such premises, we may conclude that education as well as politics is a process of discovering what values, are most worth. The School is one of the community's resources for social experimentation and, as such, should not be neglected." Brubacher, *Modern Philosophies on Education,* 194 (1962). "There is no teacher, no school, which can escape the problem of life orientation, the ultimate commitments by which every person must live." Phenix, *The Scholars Look at the Schools,* 18 (1962).

what extent a "religious" (Christian, Hebraic, secular humanist, for example) idea has entered into the process, or whether it has been entered in a manner rendering it inculcatory, or whether it has appeared in so great a degree that it could be said as a matter of law that a real effect of the instruction was to advance some religion or another. Appellants' argument comes down to the assertion that any given secular textbook (*e.g.*, Hallett, *Machine Shop Theory & Practice* (1962) (gr. 7-12), or Adams, *Great Negroes Past and Present* (1964) (gr. 7-9), or Herzberg, *Better English* (1960) (gr. 8), or Mallory, *New Mathematics in Practice* (1963) (gr. 9), or Carson, *The Sea Around Us* (1958) (gr. 9), or Pei, *Expressions de Tous Les Jours* (gr. 6-9))* is constitutionally innocuous when loaned to a public or private nonsectarian school pupil but that the identical book, when loaned to a pupil in a religiously-affiliated school, inexorably becomes so tainted that the mere fact of its being so loaned has the primary effect of advancing religion. The book itself does not change.

d. *If the Court upholds the Act, it " . . . would mean that a state could constitutionally underwrite the entire cost of parochial education . . . "* (Br. 15). This argument overlooks the role of this Court in constitutional matters. It also ignores the fact that this case deals solely with the loan of state-approved textbooks which are themselves secular and which are used by all students both within and without their respective schools. The status of any other legislative program relating to education of children at-

* All of the above cited textbooks are to be found in Textbook List, Board of Education—City of New York, For Use in Requesting Textbooks in Accordance with New York State Textbook Law.

tending religiously-affiliated schools which may be adopted by a state will not be automatically resolved by approval of this Act, but will depend on a judicial determination as to whether or not such program meets the test announced by this Court in *Everson* and *Schempp*.

* * * * *

In summary, we submit that the Textbook Loan Act has both a secular legislative purpose and a primary effect that neither advances nor inhibits religion. Accordingly, it does not constitute an establishment of religion.

III.

The Weight of State Court Authority Favors Constitutionality of the Act.

The New York textbook statute here under attack is not unique. Similar statutes are in effect in several other States:

Louisiana since 1928 (La. Rev. Stat. §§ 17:351, 17:352 (1963)).

New Mexico since 1929 (N.M. Stat. Ann. § 77-13-7 (Supp. 1967), *formerly* N.M. Stat. Ann. §§ 73-18-5, -9 (1953)).

Mississippi since 1940 (Miss. Code Ann., Tit. 24, § 6656 (1952)).

Rhode Island since 1963 (General Laws of Rhode Island § 16-23-2 (Supp. 1967)).

In addition West Virginia (since 1939) and Indiana (since 1921) have statutes providing in substance for the furnishing of free textbooks when the parents are financially unable to pay for them (W. Va. Code Ann. § 18-5-21b

(1966); Burns Ind. Stat. Ann. § 28-512 (1948)). Since 1913 Kansas has allowed private schools "the same privileges in the purchase and distribution of" textbooks published under the Kansas school book law as the public schools receive. (Kansas Stat. Ann § 72-4107 (1964)).

Appellants' discussion of cases allegedly showing a "trend" in state court decisions away from upholding the constitutionality of analogous textbook loan programs is misleading. (Br. 28-30). Decisions of the highest state courts in cases in which the furnishing of books to pupils in religiously-affiliated schools have been challenged may be grouped as follows:

1. *Rulings upholding constitutionality under both federal and state constitutions: Cochran* v. *Louisiana State Board of Education,* 168 La. 1030, 123 So. 664 (1929), *aff'd,* 281 U.S. 370 (1930); *Board of Education of Central School Dist.* v. *Allen,* 20 N.Y.2d 109, 228 N.E.2d 791, 281 N.Y.S.2d 799 (1967).

2. *Rulings upholding constitutionality under state constitutions—Establishment Clause of federal constitution not in issue: Borden* v. *Louisiana State Board of Education,* 168 La. 1005, 123 So. 655 (1929); *Chance* v. *Mississippi State Textbook Rating and Purchasing Board,* 190 Miss. 453, 200 So. 706 (1941) ("The state is under duty to ignore the child's creed, but not its need.").

3. *Ruling of unconstitutionality under state but not federal constitution: Dickman* v. *School District,* 232 Ore. 238, 366 P.2d 533 (1961).

4. *No ruling on federal or state constitutionality: Haas* v. *Independent School District,* 69 S.D. 303, 9 N.W.2d 707

(1943) (Furnishing of books *ultra vires* under statute making no mention of pupils in other than public schools); *Zellers* v. *Huff*, 55 N.M. 501, 236 P.2d 949 (1951) (Question of secular textbooks not in issue. Lower court enjoined free loan of "Catholic edition" textbooks to Catholic schools. No decision by New Mexico Supreme Court on the issue because of defect of parties, the Supreme Court lacking jurisdiction, under the facts, over the State Board of Education).

One lower court ruling has held such programs constitutionally invalid on both State and Federal grounds. *Bowerman* v. *O'Connor* (Superior Court of Providence County, Rhode Island, Equity No. 31775, decided September 19, 1968 and now on appeal to the Supreme Court of Rhode Island (No. 287-A).

From the foregoing it is seen that what state authority there is as a guide to decision in the instant case favors the constitutionality of the Act here involved. Two of the highest courts of states have upheld textbook programs under the federal constitution (Louisiana and New York). Three have upheld them under state constitutions having provisions barring aid to sectarian institutions (Louisiana, New York and Mississippi). The highest court of no state has declared such a statute to violate the federal constitution.

IV.

The Only Free Exercise Issue in This Case Is That Raised by Appellants' Demand That the Benefits of the Act Be Denied to One Particular Class of Children on the Ground That They Attend Religiously-Affiliated Schools.

The Textbook Loan Act by its terms applies to *all* children in *all* schools which comply with the requirements of the compulsory education law. There are, of course, three types of such schools: (i) public schools; (ii) nonpublic schools which are *not* religiously affiliated; and (iii) nonpublic schools which *are* religiously affiliated. Appellants' attack is directed solely against children attending schools of type (iii). They now assert that to the extent, and only to the extent, that the Act requires textbooks to be furnished to children in religiously-affiliated schools, it violates the Free Exercise Clause, as well as the Establishment Clause. (Br. 31)

At the outset there is a question, unanswered by appellants' brief, as to the constitutional basis for their assertion that they as boards of education, and not as individual parents or taxpayers, are entitled to claim the benefits of the Free Exercise Clause. Their complaint (2a-7a) makes no mention of the Free Exercise Clause, and appears to rely (so far as their federal claim is concerned) solely on the Establishment Clause.

Putting aside this threshold issue as to standing, appellants' main "Free Exercise" contention is that the law "compels a man to contribute to the propagation of opinions which he disbelieves" (Br. 31, 35).

Appellants fail not only to say of whose opinions they complain, but of what opinions they complain. The Text-

book Loan Act, involving only secular textbooks, does not call for the propagation of any religious opinion, and presumably appellants do not complain about any opinions expressed in those textbooks. If they do so complain, their complaint would be equally applicable to any textbook given to any child in any school where the textbook contained material with which any taxpayer happened to disagree as a matter of conscience. For example, a Christian Scientist could object to the distribution of hygiene texts on the ground that he was being compelled to "contribute to the propagation of opinions which he disbelieves". The Free Exercise Clause, assuming that it can be raised by these appellants, does not require this extreme result.

In any case, appellants' vague and far-fetched charge that the Act somehow violates the Free Exercise Clause is sufficiently answered by the reasons we have already given which compel the conclusion that the Act does not violate the Establishment Clause.

Appellants' charge, however, triggers vital Free Exercise and Equal Protection concerns with respect to those *beneficiaries* of the Act who attend religiously-affiliated schools. They attend these schools under the compulsory education law. Where the State compels attendance at some school, and conscience (under constitutional protection) compels the selection of a particular school (where the requirements of law may be fulfilled), serious free-exercise problems would arise if those particular children were to be cut off from the benefits of a general public-welfare statute applicable by its terms to all children in the State.

As appellants would rewrite the Act, it would provide that secular textbooks must be loaned to pupils attending (i) public schools and (ii) non-public schools in which no

religious instruction is given, but that such textbooks must *not* be loaned to pupils attending (iii) any school in which religion is taught. The religious affiliation of the child (or of the school which he attends) would thus become the direct and sole test as to whether secular benefits generally available to all children should be granted or denied.

This would condition receipt of public benefits upon attendance at public schools or at private schools which are not religiously affiliated, in violation of the right of religiously-minded school children and parents to the free exercise of their religion. In *Sherbert* v. *Verner*, 374 U.S. 398 (1963), this Court held that South Carolina had infringed an individual's right to the free exercise of religion by denying her application for unemployment compensation after her discharge for refusal to work on Sunday, the Sabbath day of her faith. Noting that it was

> "too late in the day to doubt that the liberties of religion . . . may be infringed by the denial of or placing of conditions upon a benefit or privilege" (374 U.S. at 404),

this Court declared that its holding

> " . . . but reaffirms a principle that we announced a decade and a half ago, namely that no State may 'exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation.' *Everson* v. *Board of Education,* 330 U.S. 1, 16." 374 U.S. at 410. (Emphasis in opinion).

The educational liberty declared in *Pierce* does not exist *in vacuo*, as a thing apart from the real lives of real children in the real world of which education today is so large a part and the presence of welfare spending so great a factor.

This Court has never made such a ruling as appellants demand. It has looked to the development of liberty, not to its constriction. This has meant problems for the Court —none greater than that of resolving the inherent tension presented by the Establishment and Free Exercise clauses of the First Amendment. Such tension has been repeatedly pointed to by this Court—that

> " . . . the logical interrelationship between the Establishment and Free Exercise Clauses may produce situations where an injunction against an apparent establishment must be withheld in order to avoid infringement of rights of free exercise." *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 247 (Brennan, J., concurring) (1963)

The tension—and the possible conflict—between the two clauses is present in this case by virtue of the appellants' complaint and the nature of the relief which they seek. That conflict can be resolved, and full effect can be given to both clauses, by applying the principles laid down in *Everson* and *Schempp*. Under those principles we submit

> (i) this general public-purpose statute, applicable to *all* children, *including* those who attend religiously-affiliated schools, does not conflict with the Establishment Clause.
>
> (ii) the *exclusion* of a particular class of children, on purely religious grounds, from the benefits

of this general-purpose statute would raise serious questions under both the Free Exercise and Equal Protection Clauses.

CONCLUSION

It Is Respectfully Submitted That This Court Should Affirm the Judgment Below.

Dated March 28, 1968

Respectfully submitted,

PORTER R. CHANDLER
1 Chase Manhattan Plaza
New York, N. Y. 10005

WILLIAM B. BALL
212 State Street
Harrisburg, Pa. 17101

Attorneys for Intervenor-Appellees

RICHARD E. NOLAN
JEROME M. CONGRESS
FRANCIS J. MORISON
JAMES J. MACKRELL
DAVIS POLK & WARDWELL

of Counsel

SUPPLEMENT A

Text-Book Loan Act of 1965

Section 701, New York Education Law, as amended by Chapter 320 of the Laws of 1965 and Chapter 795 of the Laws of 1966 (effective September 1, 1966):

Section 1. Statement of policy. The security and welfare of the nation require the fullest development of the mental resources and skills of its youth. This calls for more adequate educational opportunities and increased efforts to educate more of the talent of our nation and requiring the correction of those imbalances in our educational programs which have led to an insufficient proportion of our population educated in the fields of science, mathematics, foreign languages and other non-sectarian subjects. The Congress of the United States has reaffirmed the principle that the states and local communities retain primary responsibility for public education. It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state.

§ 701. Power to designate text-books; purchase and loan of text-books; purchase of supplies

1. In the several cities and school districts of the state, boards of education, trustees or such body or officer as perform the functions of such boards, shall designate text-books to be used in the schools under their charge.

2. A text-book, for the purposes of this section shall mean a book which a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends.

3. In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities. Such text-books are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities.

4. No school district shall, during the school year nineteen hundred sixty-six–sixty-seven, the school year nineteen hundred sixty-seven–sixty-eight or the school year nineteen hundred sixty-eight–sixty-nine be required to purchase or otherwise acquire textbooks, pursuant to this section, the cost of which shall exceed an amount equal to fifteen dollars multiplied by the number of children residing in such district who on the first day of October, of such school year are enrolled in grades seven through twelve of a public or private school which complies with the compulsory

education law, or in any subsequent school year be required to purchase or otherwise acquire textbooks, the cost of which shall exceed an amount equal to ten dollars multiplied by the number of children residing in such district and so enrolled on the first day of October of such subsequent school year; and no school district shall be required to loan textbooks in excess of the textbooks owned or acquired by such district; provided, however that all textbooks owned or acquired by such district shall be loaned to children residing in the district and so enrolled in grades seven through twelve in public and private schools on an equitable basis.

5. In the several cities and school districts of the state, boards of education, trustees or other school authorities may purchase supplies and either rent, sell or loan the same to the pupils attending the public schools in such cities and school districts upon such terms and under such rules and regulations as may be prescribed by such boards of education, trustees or other school authorities.

6. The commissioner of education, in addition to the annual apportionment of public monies pursuant to article seventy-three of this chapter, shall apportion to each school district an amount equal to the cost of the text-books purchased and loaned by the district pursuant to this section, but in no case shall the aid apportioned to the district be in excess of the following amounts: a. on account of expenditures made during the school year nineteen hundred sixty-six–sixty-seven, the school year nineteen hundred sixty-seven–sixty-eight or the school year nineteen hundred sixty-eight–sixty-nine an average of fifteen dollars per pupil residing in the district and enrolled in grades seven through twelve, and

b. on account of expenditures made in any subsequent school year an average of ten dollars per pupil residing in the district and enrolled in grades seven through twelve.

7. The apportionment provided for in this section shall be paid, at such times as may be determined by the commissioner and approved by the director of the budget, during the school year in which the expenditures are made to the extent that such expenditures have been made and reported to the department prior to such apportionment. Expenditures by a school district in excess of the average of fifteen dollars per pupil in the school year nineteen hundred sixty-six–sixty-seven, the school year nineteen hundred sixty-seven–sixty-eight or the school year nineteen hundred sixty-eight–sixty-nine or in excess of ten dollars per pupil in any subsequent school year shall be deemed approved operating expense of the district for the purpose of computation of state aid pursuant to subdivision five of section thirty-six hundred two of the chapter, but expenditures up to such average of fifteen dollars or ten dollars above mentioned shall not be deemed approved operating expenses for such purpose.

SUPPLEMENT B

Opinion of Counsel No. 181

THE UNIVERSITY OF THE
STATE OF NEW YORK

Education [Seal] Department

To: City, Village and District Superintendents of Schools and Supervising Principals

Re: Chapter 320 of the Laws of 1965 relative to the purchase and loan of textbooks, as amended by chapter 795 of the Laws of 1966

Chapter 795 of the Laws of 1966, effective September 1, 1966, amends chapter 320 of the Laws of 1965 which is also effective September 1, 1966.

As amended by these two chapters, Article 15 of the Education Law, entitled "Text-Books", now provides as follows:

1. Designation of textbooks—public schools.

There is no change in the previous provisions of the Education Law, Section 701, subdivision 1. Textbooks will continue to be designated by the school board or trustee, for use in the public schools.

2. Change of designation of textbooks—public schools.

Section 702 has not been amended by either of the above chapters, and hence the limitation on changes of designation of textbooks for the public schools continues in effect

(changes in designation may be made only upon a three-fourths vote of the school board, or five years after designation).

3. Subversive textbooks—public schools.

Section 704, relating to subversive textbooks has not been amended by these chapters and likewise continues in effect without change, as does Section 705 relating to certain penalties.

4. Definition—New Law.

Subdivision 2 of Section 701 defines the term "Text-Book", for the purpose of Section 701 only, as "a book which a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends". Reference books, workbooks, novels and other fiction, review books, test materials, materials in kit form and other supplementary books and material are not textbooks and may not be furnished.

5. Power and duty to purchase and to loan.

Subdivision 3 of Section 701 requires all school boards to purchase and to loan, "upon individual request", textbooks as defined above, to all children residing in the district who are attending grades seven through twelve in any public school and in any non-public school which complies with the Compulsory Education Law.

6. Limitations on kinds of textbooks.

In order for the mandate set forth in 5 above to become applicable, it is necessary that

a. The textbooks be non-sectarian (this eliminates denominational editions and those carrying the "imprimatur" or "nihil obstat" of a religious authority), and

b. The textbook had been "designated for use in any public elementary or secondary schools of the State or * * * approved by any school board".

c. In case of doubt as to a. above, the school board must make the appropriate determination; and in case of doubt as to b. above, the school board should make appropriate inquiries from the school board concerned, or else decide if it wishes to approve the same itself.

7. Fees and charges.

Section 701, subdivision 3, requires that the textbooks be "loaned free" to the children, but authorizes school boards to make reasonable rules and regulations. Such rules and regulations may contain requirements for reimbursement, by the student to the school district, for damage, loss or destruction of loaned textbooks.

8. Limit on requirement to purchase.

a. Subdivision 4 of Section 701 states that no district, during 1966-67, 1967-68 or 1968-69, will be required to purchase or otherwise acquire textbooks, under this section, at a total cost to the district in excess of $15 multiplied by the total number of resident students in grades 7-12, of public schools and private schools which comply with the provisions of the Compulsory Education Law, i.e., which provide at least substantially equivalent educational services and facilities (in the judgment of the school board

of the district of location of the non-public school) as the public schools of the district of location provide.

b. Textbooks need be, and may be, purchased only for resident pupils. Textbooks for children attending a school located in one district, but which children reside in another school district, must be provided by such other school district. Textbooks need not be provided for pupils residing in a school district in this State, but attending a non-public residential school in another State.

c. The term "otherwise acquired" textbooks, which term does not appear in the basic mandate "to purchase and to loan" (Section 701, subdivision 3) merely authorizes the acquisition, in compliance with the statute, as amended, by gift, or by consolidation of school districts, or by centralization occurring after September 1, 1966.

d. Subdivision 4 of Section 701 further states that no district *during 1969-70* or during any subsequent school year will be required to purchase or otherwise acquire textbooks under this section at a total cost to the school district in excess of $10 multiplied by the total number of resident students in grades seven through twelve of public and appropriate non-public schools.

e. For the purpose of this limitation on the requirement to purchase (or otherwise acquire) in 1966-67 and thereafter, the resident enrollment of public and non-public students in grades seven through twelve must be ascertained as of October 1 of each such year. An increase or decrease of enrollment after such date will have no effect on the requirements of the statute.

f. It must be noted that subdivision 4 of Section 701 does not *require* any district to expend *at least* $15 (or

$10) multiplied by the appropriate enrollment. The provision states in effect that even if the needs as resulting from other provisions of the statute are greater than that limitation, nevertheless no district need spend more than such limitation (see 15. below).

9. Summer school.

There is no requirement that a board purchase textbooks specifically for use at summer school; however, books may be loaned to the extent that they are on hand.

10. Purchase of textbooks.

Purchase orders for textbooks need to be awarded after competitive advertising to the lowest bidder, pursuant to General Municipal Law, Section 103 (unless a specific textbook can be procured only from the publisher in which case the competitive bidding procedure is not required).

Where students have been purchasing their own textbooks, the school board, if it wished to do so and considered this a wise procedure, could purchase such books from the individual students.

11. Textbook purchases are ordinary contingent expenses.

a. While the statute, unlike the transportation section, does not expressly so state, textbook purchases under this statute are clearly ordinary contingent expenses.

b. This is true even where a board of education purchases textbooks in excess of the dollar amount mandated by subdivision 4 of Section 701, since the *power* to purchase is expressly vested in the school board and the limitation of subdivision 4 applies only to the *duty* to purchase.

c. Hence, in cases where budgets are defeated by the voters, the board nevertheless has the duty to purchase up to the requirement, and has the power to purchase in excess of the mandate.

d. Likewise, in those cases where district budgets have been adopted at annual meetings in 1966, the school boards will nevertheless be required and authorized to make books available in September of 1966, irrespective of the amount contained in the budget.

12. "Upon individual request".

Under the statute, both the power and the duty to purchase and loan textbooks depend upon individual requests to the school board for such textbooks.

In compliance therewith, the nonpublic school could either forward such individual pupil requests to the school board collectively or keep such requests on file and forward merely a summary of the requests to the board of education. In any event, however, the requests of each student must be addressed to the board of education of the district of residence.

13. Date of payment for textbooks.

The amendments to the Education Law under which the new procedure is authorized and required, do not become effective until September 1, 1966. Hence, no payments for textbooks ordered under the new law can be made prior to such date.

While the effective date section of the bill makes no specific exception to this effect, textbooks may nevertheless be ordered prior to the effective date.

14. State aid.

a. Subdivision 6 of Section 701 provides that school districts will receive an additional amount of State aid "equal to the cost of the textbooks purchased and loaned by the district pursuant to this section, but in no case * * * in excess of the following amounts: a. On account of expenditures made during the school years 1966-67, 1967-68 and 1968-69, an average of $15 per pupil residing in the district and enrolled in grades 7-12, and b. on account of expenditures made in any subsequent school year an average of $10 per pupil residing in the district and enrolled in grades 7-12."

b. This means that districts will need to ascertain the total amount of money spent during each of these years for the purchase of textbooks loaned to students under the statute; thereafter the district will need to multiply the amounts of $15 and $10 respectively by the total number of resident students in grades 7-12 *as of October first* and the smaller of these two amounts (expenditure or ceiling) will be the amount of the special State aid due under subdivision 6.

c. Thereafter the amount, if any, resulting by deducting the amount of special aid arrived at under b. above, from the actual amount expended by the district for the purchase of textbooks, is added to the amount of approved operating expenses of the district pursuant to Education Law, Section 3602, subdivision 5.

d. The special aid under subdivision 6 (see b. above) is payable during the school year in which the expenditures are made to the extent that such expenditures have been made *and* reported to the Department prior to a date to

be set jointly by the Commissioner and the Director of the Budget (which will be announced).

e. Aid payable under c. above, if any, becomes payable during the school year following the year of expenditure, as is all other operating expense under subdivision 5 of Section 3602, unless the district receives its operating expense aid under that subdivision, as amended by Chapter 767 of the Laws of 1966, on the budget basis. In such case operating expense aid, including the amounts here involved, will be paid currently, subject to adjustments the following year.

f. The expenditures for textbooks not exceeding the mandate are not aidable under subdivision 5 of Section 3602.

g. If a district issues bonds or notes for the purpose of financing the purchase of textbooks under the statute, the State aid payments will need to be made currently based on debt service payments of the district. In such case the "expenditure" (meaning an expenditure from local district funds) would not be made until debt service is paid and hence the "expenditure" would be made, for instance, during 1967-68 if the books are purchased from the proceeds of obligations in 1966-67 and the first debt service payment is due in 1967-68. Consequently, the aid payment would [be] $10, rather than $15, multiplied by the appropriate enrollment figures, if the "expenditure" is made during the school year 1969-70, and the obligations are issued during 1968-69.

15. Procedure.

a. The first step for a district to take is to ascertain the needs of the public and non-public students, as ex-

pressed by requests for loan of textbooks, in the various subjects. This will result in finding the number of books needed in each subject.

b. The number of books needed in each subject then must be checked against existing book stocks. It is obviously unnecessary to duplicate textbooks owned by any of the schools involved and available for the respective student's use.

Existing book stocks and newly to be purchased textbooks will need to be distributed among the respective students on an equitable basis.

c. Having ascertained the number of textbooks needed in each subject, the total amount necessary to purchase all textbooks must then be checked against the limitation on mandated expenditures for the appropriate school year, as contained in subdivision 4 of Section 701 (see 8. above).

d. Unless the necessary dollar amount is within that limitation, the board of education will then need to decide whether it wishes to exceed such limitation (as indicated in 11 above, no vote of the district is necessary for this purpose).

e. If the amount needed is in excess of both the limitation and the amount by which the school board is willing to exceed that limitation, the board will need to determine how to utilize the funds thus available in order to best meet the needs of the pupils as expressed by the requests received, on an equitable basis. Since a board of education may not discriminate between individual students in either the public or the non-public schools it is suggested that in such case the board determine how many categories of textbooks (such as science, mathematics, social studies,

etc.) can be loaned free to both public and nonpublic pupils within the dollar amount thus available. Categories of textbooks not so included will then need to be purchased by the students themselves (unless other sources of funds are available).

16. Accounting and storage.

a. All books remain the property of the school district and must be treated as such. Such ownership should be indicated in or on each book by labels or other appropriate methods of identification.

b. There is no reason why textbooks used in a non-public school could not be stored in that school under an agreement with the school board and the governing body of the non-public school. The district may not, however, pay storage charges to non-public schools in this connection.

17. Textbooks for grades 1 through 6.

Section 703 of the Education Law (as amended by chapter 320 of the Laws of 1965) authorizes the qualified voters of common, union free, central and central high school districts, to vote a tax at an annual or special meeting for the purpose of providing free textbooks to all pupils enrolled in grades 1 through 6 of the public schools of the district. (City School Districts have their own provisions: §§ 2503, subd. 7 and 2854, subd. 7.)

18. Supplies.

Subdivision 5 of Section 701 authorizes school boards to purchase supplies and either to rent, sell or loan the same to the pupils in the public schools on appropriate terms and conditions.

19. Legal questions.

Any questions relating to the interpretation of Article 15 of the Education Law, as amended by both chapter 320 of the Laws of 1965 and chapter 795 of the Laws of 1966 should be addressed to the Office of Counsel or to the Law Division.

Sincerely yours,

/s/ CHARLES A. BRIND
Charles A. Brind

July 8, 1966

SUPPLEMENT C

Sample Instructions From Local Board of Education Under Textbook Loan Act

NISKAYUNA PUBLIC SCHOOLS

Schenectady 9, New York

This regulation is issued by authorization of the Niskayuna Board of Education.

A. Textbooks at the time of issuance are to be classified as follows:

1. New book.
2. Book has strong binding, unsoiled cover, no missing pages, no torn pages, and no marked pages.
3. Book has strong binding, unworn cover, no missing pages, no torn pages, and few marked pages.
4. Book has adequate binding, complete cover, no missing pages, and few torn or marked pages.
5. Book has binding, cover, and several missing, torn or marked pages.
6. Book has inadequate binding or cover, and many missing, torn or marked pages.

A newly bound book is to be in classification 3 or 4 depending on condition of contents.

B. The student is responsible for the protection of the textbooks issued to him. Normal depreciation of the hard cover textbooks is a reduction of not more than one

classification: i.e. a book issued in classification 1 is presumed to have been given proper protection if it is returned at the end of the course in classification 2 condition. Normal depreciation of soft cover textbooks is a reduction of not more than two classifications.

C. There shall be assessments for damage in excess of normal depreciation and for failure to return textbooks. The assessments stated as a percentage of current list price for damaged textbooks and for not returning textbooks are to be made:

Damage to Books			Books Not Returned		
Reduction in Classification	Hard Cover	Soft Cover	Classification when issued	If Replaced during year	If not returned end of course
1	0%	0%	1	75%	60%
2	15%	0%	2	60%	45%
3	30%	15%	3	45%	30%
4	45%	30%	4	30%	15%
5	60%	45%	5	15%	0%
			6	0%	0%

D. Textbooks are not to be issued for the next semester or year to any student who has not paid any assessments for damaged or unreturned textbooks.

APS:ka
9-6-66

NISKAYUNA PUBLIC SCHOOLS

SINGLE STUDENT APPLICATION FORM PRIVATE SCHOOLS—NEW YORK STATE TEXTBOOK LAW, AS AMENDED—1966

PLEASE PRINT

Student's Name:..... Non-Public School Attending:.....
last first initial

Street Address:.....

Post Office:.....

Parent or Guardian Name:..... Request for school year Sept. 19..... to June 19.....

Address:.....

(leave blank if same as above)

Application for Loan of Textbooks from Niskayuna Public School district, I hereby apply for the loan of the textbooks listed below, pursuant to provision of the New York State Education Act, Section 701, subdivision 2 and accept the obligations for use and return of the textbooks in accordance with regulations of the Niskayuna Public Schools shown on the reverse side.

Student's Signature:..... Date:.....

	Author	Title	Publisher	Edition	Date	Books Required for List Course	Grade	Price
1								
2								
3								
4								
5								
6								
7								
8								
9								
10								
11								
12								

TOTAL NUMBER OF BOOKS REQUESTED:.....

Public School Official's Certification of Student's Request:

This is to certify that the applicant is a student in the above named non-public school and that the textbook he (she) requests are for use in the courses listed above.

Non-Public School Official's Signature:..... Date:.....

S-18

S-19

CODE—220-399-2-NYSTL REQ. NUMBER .....

TEXTBOOK REQUISITION

PUBLISHERS NAME .....

STREET ADDRESS .....

CITY AND STATE .....

SHIP TO —EDISON WAREHOUSE

STREET —VAN GUYSLING AVE.

CITY & STATE—SCHENECTADY, N. Y.

NO. COPIES ..... NAME OF BOOK ..... TOTAL .....

EDITION .....

GRADE LEVEL .....

PRICE PER BOOK ....

Total Amount

I certify that the following number of children residing in your school district have individually requested the loan of the textbook indicated above for the school year 1967-68 in accordance with Section 701, subdivision 2, of the Education Law. Form 1 requests have been submitted to you for each child. I also certify that the textbook requested is a non-sectarian edition and approved for use by a New York State Public School District.

....

Name of Parochial/Private School Official of Private School

SUPPLEMENT D

Rules of New York Board of Regents

Admission, Privileges and Grades of Secondary Schools

3.30 Requirements and privileges. Secondary schools and academic departments of school districts in the State of New York may upon proper application and after official inspection be admitted to the University by a vote of the Regents. Such school shall afford not less than 175 days in each year of approved academic instruction, equipment and teaching force, and may hold Regents academic examinations in the subjects covered by their approved courses of study for the grades for which they are admitted.

3.31 Grades. Secondary schools shall be graded as junior high schools, middle high schools, industrial high schools, technical high schools, continuation high schools, and high schools, and the requirements therefor shall be as follows:

(a) A junior high school shall consist of the seventh, eighth and ninth grades, organized as a separate unit with approved courses of study and approved apparatus and library.

(b) A middle high school shall maintain an approved course of study covering one year of high school work above the eighth grade. It shall have approved apparatus and library.

(c) A high school (senior) shall maintain an approved four-year course of study above the eighth grade and shall

have approved apparatus and library. Such term shall include the six-year high school, covering the work of grades seven to twelve.

(d) Industrial high schools may offer one, two, three or four-year industrial or trade courses open to pupils who have completed the work of the ~~eighth~~ grade of the elementary schools. Such schools shall be organized as a separate unit with distinctive, approved courses of study and with approved equipment and facilities for industrial and trade education.

(e) Technical high schools may offer three or four-year general or specialized technical courses of secondary school grade. Such schools shall be organized as a separate unit with distinctive, approved courses of study and approved equipment for technical work.

(f) Continuation high schools may offer general or specialized courses open to pupils 16 and 17 years of age who are not regularly enrolled in the full-time schools. Such schools shall be organized as a separate unit with distinctive courses of study and equipment and facilities adequate for providing the proper instruction for working children.

SUPPLEMENT E

Regents Rules as to Registration and Approval of High Schools

(Statutory authority: Education Law § 207)

Sec.
100.1 The curriculum
Sec.
100.2 Organization and administration

Section 100.1 The curriculum. (a) An approved high school four-year course of study shall include the following units of work or their equivalent: English, 4 units; social studies including a year of American history, 3 units; science, 1 unit; health, ½ unit; and physical education. Science shall be included in the ninth year. A guidance and counseling program shall be provided, including the services of personnel certified for guidance service. These subjects shall constitute the "constants" or required subjects and shall be offered in accordance with the State syllabuses.

(b) The value of sequential work shall be recognized. To this end the program of each pupil shall be so planned that his own interests and abilities may be challenged. Each pupil shall follow through a three-year sequence in one of the following fields: science, mathematics, foreign language, music, art or drawing, business subjects, practical and industrial arts or vocational subjects.

(c) The additional units necessary to complete the minimum 16-unit program in the four-year high school or the 12-unit program in the senior high school shall be free

electives. The complete program offered in any particular school shall be determined in terms of the size of the school, the fundamental arts and interests of the community and the adolescent groups whose needs are to be served.

(d) The junior high school (or grades, 7, 8 and 9 in the six-year secondary school) shall include in its curriculum English, social studies, science, mathematics, health education, drawing, music and practical arts. There shall be a partial or complete departmental organization. The school shall give recognition to individual differences in capacities, tastes and abilities in the organization and technique of class work. There shall be a definite and effective plan of pupil guidance, including the services of personnel certified for guidance service.

100.2 Organization and administration. (a) A high school shall require for graduation the completion of a secondary school course including the curriculum constants and covering a minimum of 16 units in grades 9 to 12 or 12 units in the senior high school, grades 10 to 12, exclusive of units that may be granted for physical education. A unit is defined as a year's work in one subject requiring four or five periods weekly of prepared classroom work throughout the school year or the equivalent. The minimum length or a recitation period shall be 40 minutes, exclusive of the time used in changing the classes or teachers. The distribution of the secondary school course over a longer period or excellence of results shall compensate for varying schedules.

(b) Nothing herein contained, however, shall prevent a board of education from making such curriculum adaptations as are necessary to meet local needs and conducting

such experimentation as may be approved by the commissioner. This principle of flexibility shall apply to every area of the curriculum. The exercise of initiative and responsibility on the part of local school authorities in the administration of the curriculum is encouraged.

(c) The efficiency of instruction, the acquired habits of thought and study, the general intellectual and moral level of the school are paramount factors in determining its standing. Only schools which rank high in these qualities, as shown through competent, sympathetic inspection, as well as through the provision that is made for meeting individual pupil and group needs, should be considered eligible for full high school grade.

(d) A sufficient number of qualified teachers must be provided to care adequately for all instruction offered. An approved high school shall have a salary schedule which is sufficient to secure teachers with proper qualifications.

(e) The number of daily periods of classroom instruction for a teacher should not exceed five. A school requiring of any teacher more than six teaching periods a day, or a daily teaching load of more than 150 pupils, should be able to justify the deviation from this policy.

(f) The location and construction of school buildings and equipment shall be such as to secure hygienic conditions for both teachers and pupils. The library and apparatus facilities shall be such as to meet adequately the needs of instruction in the several subjects of the curriculum.

(g) No new public high school shall be recommended for registration by the Commissioner of Education sub-

sequent to December 1, 1961, unless it has an enrollment of more than 700 pupils in the upper six years except where it can be demonstrated to the satisfaction of the commissioner that density of population, transportation distances or other factors indicate that the registration of a school with greater or less enrollment is essential to the educational welfare of the children.

(h) No new public high school shall be recommended for registration by the Commissioner of Education subsequent to December 1, 1961, if, in his judgment, the establishment of such school would conflict with an approved plan for district reorganization, except where it can be established to the satisfaction of the commissioner that such school is essential to the educational welfare of the children.

(i) Nothing herein contained shall affect schools already registered.

The University of the State of New York
Education Department

Be it known that

having satisfactorily passed examinations in the subjects prescribed for the completion of an approved four year course in the

is thereby entitled to this

High School Diploma

In witness whereof the Regents issue this diploma under seal of the University at Albany in the month of 19

James E. Allen, Jr.
President of the University and Commissioner of Education

Principal

SUPPLEMENT F

Regents High School Diploma
With Record Sheet and Examination and
Certification Requirements

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT
BUREAU OF ELEMENTARY AND SECONDARY EDUCATIONAL TESTING
ALBANY, NEW YORK 12224

RECORD SHEET FOR ISSUANCE OF STATE REGENTS HIGH SCHOOL DIPLOMA

Pupil..... School.....

SUBJECT	SCHOOL	DATE WRITTEN MO. YR.	RATING IN REGENTS EXAMINATION	RATING IN EXAMINATION IN LIEU OF REGENTS	SCHOOL RATING (IN CERTIFIED SUBJECTS ONLY)	UNITS OF CREDIT
Group 1. Constants						
English						
World history						
American history 1						
American history 2						
American history and world backgrounds III						
Social studies (ninth year)						
Mathematics (1 unit)						
Science (ninth year)						
Health						
Group 2. Sequence						
Group 3. Electives						

NOTE: 1. In addition to passing the Comprehensive English Regents Examination, the pupil must have satisfactorily completed 4 units of English, by appropriate study or local examination, as certified by the principal. Indicate in the last column the number of units in English actually completed by the student.
2. If subjects other than health, ninth year social studies (world regions) or ninth year science (general science) are offered in lieu of these subjects, write in the full name of the subjects offered.
3. Indicate the subject offered to fulfill the 1 unit requirement in mathematics.
4. Ninth year science and mathematics (1 unit) when used in a sequence under group 2, should be listed there and not under group 1.

NOTE: 1. List here the subjects offered for the 3-unit sequence, and also the subjects offered for endorsement of the diploma in a special field.
2. Enter Regents examination ratings in all subjects in which Regents examinations are given and required.

NOTE: 1. Write in names of subjects offered to make the total of at least 18 units.
2. Regents examination credit is not required in group 3.

Diploma action:

☐ State Regents High School Diploma issued, dated.....
☐ Diploma issued with special endorsement in .....
☐ Diploma issued with honor

Signed .....

Title .....

NOTE: Satisfactory completion is required of an approved 4-year high school course, including the instruction required by law in civics, physiology, and hygiene (included in social studies, science, or health courses) and physical education.

DET 343
X5017-O47-100,000(53373)*

[OVER]

EXAMINATION AND CERTIFICATION REQUIREMENTS FOR A STATE REGENTS HIGH SCHOOL DIPLOMA

Group 1. Constants

The satisfactory completion of each of the following and the passing of Regents examinations in English and in: (*a*) world history and American history I, or (*b*) world history and American history II, or (*c*) American history and world backgrounds III (comprehensive).

English	4 units
Social studies	3 or 4 units
Mathematics	1 unit
Science (ninth year)	1 unit
Health (either a ½-unit course or its equivalent in biology or homemaking at the senior high school level)	½ unit

Group 2. Sequence

The satisfactory completion of a 3-unit sequence in one of the fields named below, with passing of Regents examinations where these are given and required: agriculture, art, business subjects, foreign languages, homemaking, horticulture, industrial arts, mathematics, mechanical drawing, music, science, technical subjects, trade subjects ..... 3 units

Group 3. Electives

Certification by the principal to the successful completion of additional approved courses to make a total of 18 units.

Total ..... 18 units

NOTE: (1) Satisfactory completion is required of an approved 4-year high school course, including the instruction required by law in civics, physiology and hygiene (included in social studies, science, or health courses), and physical education. The 1-year mathematics requirement in group 1 can be satisfied by ninth year mathematics, general mathematics, business mathematics, or the equivalent, as a course in related mathematics.

(2) A unit is the value given to a study which is pursued 4 or 5 periods a week for a minimum of 40 minutes for each period exclusive of the time used in changing classes or teachers, for a school year of not less than 180 days and involving an equal amount of time in preparation outside of the classroom (shop and laboratory courses excepted).

(3) In a subject in which Regents examination credit is required for the State Regents High School Diploma, it is not Department policy to grant Regents examination credit on the basis of a local examination administered in lieu of the Regents examination. However, in a school system that still maintains a regular semiannual program of admission and promotion, if a pupil is unable at the time of graduation to qualify for a State Regents Diploma or for special endorsement because he lacks Regents examination credit in one of the two or three subjects needed for a sequence, request may be made to the Department for certification of credit in this subject by the principal on the basis of the local examination written by the pupil in January.

Special Endorsement of Diplomas

A Regents diploma may be issued with special endorsement in an elective sequence if the student has completed a total of 4 units of study in that subject and has passed Regents examinations in the courses completed, where such Regents examinations are offered. For example, a diploma may be issued with the notation "Special Endorsement in French" if the student has completed a 4-unit sequence in French and has passed the 3-year Regents examination. A diploma may be issued with "Special Endorsement in Mathematics" if the student has completed a 4-unit sequence in mathematics and has passed Regents examinations in all subjects taken by the student in which a Regents examination was offered (except ninth year mathematics). Similarly, a diploma may be issued with special endorsement in subjects in which Regents examinations are not regularly administered, such as art, music, homemaking, technical subjects, etc., if the student has completed 4 units of study therein. A student may be given special endorsement in more than one subject, if appropriate.

However, the special endorsement in science shall be reserved for students who have not only completed 3 units in the advanced sciences but have also completed 3 units in mathematics. The science sequence must include Regents examination credit in three courses selected from biology, chemistry, earth science, or physics. The mathematics must include Regents examination credit in 10th year and 11th year mathematics. If these requirements are met, the diploma may be issued with the notation "Special Endorsement in Scientific Subjects."

Honors Diploma

A diploma may be issued "with honor" if the student has earned an average of at least 90 percent in the Regents examinations required for the diploma under groups 1 and 2. Regents examination marks in other subjects may not be included. For example, if biology is substituted for general science but is not used to fulfill the group 2 requirements, the Regents examination is not required for the diploma.

For the purposes of computing the average, each Regents mark carries a weight of 1; it is not multiplied by the number of units (e.g., English — 92 percent, world history — 85 percent, American history 1 — 90 percent, Latin 2 — 93 percent; total 360 divided by 4 = 90 percent).

Special Endorsement With Honor

To qualify for the notation "Special Endorsement in .... With Honor," a student must achieve a Regents examination average of at least 90 percent in English, social studies, and the subjects qualifying for special endorsement.

If a student cannot qualify for this combined notation, but can qualify for either the honors notation or special endorsement, then he must choose the notation with which he wishes the diploma to be issued. Obviously, both notations should not be used unless the student actually qualifies for the notation "Special Endorsement in.... With Honor."

SUPREME COURT, U. S.
(3093)

APR 1 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 660
October Term, 1967

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACK, SAND LAKE and NORTH GREENBUSH, RENSSELAER COUNTY and CHATHAM, COLUMBIA COUNTY and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3, TOWNS OF NORTH HEMPSTEAD and OYSTER BAY, NASSAU COUNTY, NEW YORK,

Appellants,

v.

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York,

Appellee,

and

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH and BARBARA BRENNAN,

Intervenor-Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR APPELLEE, JAMES E. ALLEN, JR.

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Appellee,
James E. Allen, Jr.
The Capitol
Albany, New York 12224

RUTH KESSLER TOCH
Solicitor General

JEAN M. COON
Assistant Attorney General

of Counsel

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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Intervenor-Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE NEW YORK.

BRIEF FOR APPELLEE, JAMES E. ALLEN, JR.

Statement of the Case

Prior to amendment in 1965, New York Education Law, § 701, mandated that boards of education of school districts in the State designate textbooks to be used in schools under their control and further gave those districts the option to

purchase textbooks and supplies and either *rent or sell* them to students attending public schools in the districts. Section 703 of the Education Law also authorized the voters of a school district to authorize the provision of free textbooks to all pupils attending schools in the district. While the section did not limit the provision of textbooks to pupils attending public schools, as did § 701, as a matter of fact free textbooks were provided, by those districts which voted to do so, only to pupils in public schools.

In 1965, § 701 was amended to provide that, insofar as pupils enrolled in grades 7 through 12 of public or private schools were concerned, the districts would thereafter have the power and duty to purchase and loan, upon individual student request, textbooks for use in such schools. Textbooks to be loaned to children attending private schools are required to be books designated for use in public elementary or secondary schools in the State, or approved by a public school board. The option to provide free textbooks, formerly provided in § 703, was limited by amendment of that section to pupils enrolled in grades 1 through 6 in schools of the district. The combined effect of those amendments was to mandate the provision of free textbooks to pupils in grades 7 through 12 of both public and nonpublic schools.

Since the 1965 statute provided no dollar limits in the amounts required to be spent by the districts, although it limited State reimbursement to $10 per pupil, the statute was amended in 1966 to provide for one hundred percent reimbursement for expenditures up to $15 per pupil in the 1966, 1967, and 1968 school years and $10 per pupil thereafter, and to limit the *required* district expenditures to those amounts. The amendment also provided that expenditures in excess of those amounts would be reimbursed

as normal district operating expense, based upon a formula resulting in something less than full reimbursement.

In enacting Chapter 320 of the Laws of 1965, the New York State Legislature included in the enactment a statement of the legislative policy which prompted the adoption of the statute. That policy statement provides:

> "The security and welfare of the nation require the fullest development of the mental resources and skills of its youth. This calls for more adequate educational opportunities and increased efforts to educate more of the talent of our nation and requiring the correction of those imbalances in our educational programs which have led to an insufficient proportion of our population educated in the fields of science, mathematics, foreign languages and other non-sectarian subjects. The Congress of the United States has reaffirmed the principle that the states and local communities retain primary responsibility for public education. It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state."

While one of the primary issues in this case in the State Courts was the issue of appellants' standing, as a political subdivision of the State, to question the constitutionality of an act of the State legislature, all of the Courts which reviewed the question either ruled on the merits of constitutionality or expressed their views in *dicta*. Supreme Court, Albany County, held the statute to be unconstitutional under both the State Constitution and the First Amendment of the United States Constitution. The Appellate Division, reversing on standing to sue, also stated, both in the majority and concurring opinions, that in its view the statute was constitutional (A 45-46, 55-56, 60).

ing financial burdens has been provided to sectarian schools. The only beneficiaries of this law are students and their parents. On that basis the law cannot be said to be an establishment of religion.

What is prohibited by the establishment clause is aid directed to the aid of religion. Public welfare programs which have as their purpose the advancement of educational opportunity and of the quality of education availavailable to all children, regardless of their religious faith, are not directed to the aid of religion; they do not have as their objective the aid of any or all religions, but only aid to education and to the children receiving that education, and, therefore, do not constitute an establishment of religion.

New York's textbook loan law, having as its purpose and primary effect the advancement of educational opportunity and standards for all children in the State, has a secular legislative purpose and secular effect and therefor does not constitute an establishment of religion in violation of the prohibitions of the First Amendment.

Use of tax money to provide secular textbooks to all children in no way impedes any person in the free exercise of his own religion. It has no effect whatsoever upon the exercise of anyone's religion. However, where govenment engages in major public welfare programs in aid of education the denial of any part of that aid to children attending sectarian schools creates and expands a disadvantage in educational opportunity to those children and may by virtue of that effect make it virtually impossible, as a practical matter, for parents to send their children to sectarian schools and thereby deprive those parents and their children of the free exercise of their religion to

the extent that the free exercise clause guaranties them the right to send those children to sectarian schools.

ARGUMENT

POINT I

The provision of textbooks to all children, enrolled in grades 7 through 12, without regard to the nature of the school attended, does not constitute an establishment of or aid to religion, but rather an aid and benefit to the child receiving the textbooks.

Prior to the 1965 amendment, the New York Education Law authorized local school boards to designate textbooks to be used in public schools of such districts. It also authorizes the school districts to purchase textbooks and supplies and either rent or sell them to public school pupils. Section 703 of the New York Education Law also authorized the voters of a school district to elect to provide free textbooks to pupils in schools in the district.

The record in this case does not indicate how many districts in New York State had elected to provide free textbooks prior to the 1965 amendment. However, contrary to the allegations in the briefs of appellants and the *amici* supporting their position, at least 12 school districts in the State did not provide free textbooks, some of them districts in the cities where the problems of the educationally disadvantaged are greatest.[1] Nor does the record indicate

[1] These were Binghamton (pop. 75,941), Syracuse (pop, 216,083), Troy (pop. 67,492), Johnson City (pop. 19,118), Plattsburgh (pop. 20,172), East Aurora (central school district, no population figures available), Elmira (pop. 46,517—English texts in grades 10-12 were provided), Geneva (pop. 17,286), LeRoy (central school district—no population figures available), Rome (pop. 51,646—texts were supplied in grades below 10th), Utica (pop. 100,410—rented texts to grades 10-12 only), Schenectady (pop. 81,682).

to what extent districts providing free textbooks maintained a sufficient level of expenditure to provide up-to-date textbooks. It may also be inferred from the fact of the 1966 amendment limiting the districts' expenditure obligation, that the districts did not, in fact, provide all textbooks for all pupils in grades 7 through 12 prior to the 1965 enactment.

The record also does not state that any sectarian schools provided textbooks for their pupils. The only allegation in this regard in the record is the uncontradicted assertion by the intervenors that they, the parents, purchased the textbooks used by their children attending sectarian schools. Further support for the contention that nonpublic schools *do not* provide textbooks, is found in the statement of Francis Keppel, Commissioner of Education of the Department of Health, Education and Welfare, submitted to the General Subcommittee on Education and Labor of the United States House of Representatives on January 22, 1965, in which he stated that "Nonpublic schools *rarely* provide free textbooks". (Hearing before House Subcommittee on Education and Labor on Elementary and Secondary Education Act of 1965, Vol. I, p. 93).

The next question to be considered in order to place New York's statute in perspective is what exactly did the statute change? Insofar as grades 7 through 12 (junior and senior high school) were concerned, it changed a permissive statute, which allowed school districts to rent or sell books to pupils or, only after approval by the voters of the districts, to provide free textbooks, to a mandatory one requiring the districts to purchase and loan textbooks to all children, residing in the district and enrolled in grades 7 through 12 of public or private schools. It guaranteed that children in those grades would receive

textbooks at no cost, whereas before in many school districts the children would have had to purchase or rent them from the district.

Possibly most important is what the statute did not do. It was not surplusage as far as public school districts were concerned. Prior to the 1965 enactment, all public school districts in the State of New York did not provide all textbooks free to all pupils enrolled in grades 7 through 12 of the public schools. Many of the districts which did not provide books were city school districts where the problems of the educationally disadvantaged are greatest. As to the sectarian schools, there is no indication that they provided any textboooks for their pupils and the statute does not provide texts to the schools. On the particular facts of this case it is clear that, in fact, the parents provided their children's books and that if any group was assisted by this statute it has been the children and their parents and not the schools.

However, the appellant school boards have challenged the constitutionality of New York Education Law, § 701, on the ground that it violates the First Amendment of the United States Constitution. That Amendment, as made applicable to the states by the Fourteenth Amendment,[2] prohibits laws respecting the establishment of religion or prohibiting the free exercise thereof.

It is submitted by appellee herein that the provision of free textbooks equally to all children in the State, regardless of their religion or the nature of the school they attend, is not an establishment of religion in either the historical context of the First Amendment or within the

[2] See Cantwell v. Connecticut, 310 U. S. 296 (1940).

framework of the judicial interpretation of that Amendment.[3]

A. Nonpreferential provision of textbooks to children in both secular and sectarian schools does not constitute an establishment of religion in the historical context of the First Amendment.

While, of course, the extent of the First Amendment's application to present-day statutes is not limited to the concepts of the drafters of the Amendment, the meaning which they ascribed to it has been considered in depth by this Court in applying it to current situations (see, *e.g., Everson* v. *Board of Education,* 330 U. S. 1 [1947]; *Abington School District* v. *Schempp,* 374 U. S. 203 [1963]).

When the early settlers came to this country from Europe, they brought with them, not only political and social customs, but also many of the religious problems which were indigenous to their countries of origin. In Europe there were religions established and supported by government, a factor which engendered many of the emigrations which founded the United States. Persecution in the name of religion drove the colonists from Europe to America. But those same practices were transplanted to the New World and at the time of the adoption of the Constitution and the Bill of Rights there were established churches in a majority of the original Thirteen Colonies and almost every colony exacted some kind of tax for church support. In the language of the opinion of this Court in the *Everson* case, *supra* (p. 11):

> "These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers'

[3] The relation of the statute to the Free Exercise Clause will be discussed in Point III *infra.*

> salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment."

Consequently, the original and prime intent of the First Amendment was to prohibit the direct establishment of a national church and to further prohibit the direct support of any one religion or of all religions.

But what of statutes and government actions other than direct establishment? While not a member of the Congress which adopted the Bill of Rights, Thomas Jefferson is considered as a spokesman for the anti-establishment movement. It was he who first used the phrase "a wall of separation between church and state" in his letter to the Danbury Baptists in reply to their address of congratulation and good wishes upon his becoming President of the United States. That Jefferson did not consider this "wall" to bar all relations between government and religion is clear from both his actions and subsequent writings. Thomas Jefferson was President of the United States for 8 years, during which time Federal funds were used to aid religion in various ways without protest from the President. Federal funds were used to support missionaries to Christianize and civilize the Indians. The chaplain service for the Army and Navy had been established long before Jefferson became president and was continued under Jefferson. Probably Jefferson's most specific statement in regard to the relation of government to religion is found in a statement made in 1822, after he had left the presidency, concerning freedom of religion at the University of Virginia, of which he was one of the founders. In his report as Rector, Mr. Jefferson stated:[4]

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[4] 19 The Writings of Thomas Jefferson (Memorial Edition, 1904) 414 *et seq.*, quoted in *McCollum* v. *Board of Education*, 333 U. S. 203, 245-246 (1948).

> "The want of instruction in the various creeds of religious faith existing among our citizens presents, therefore, a chasm in a general institution of the useful sciences. * * * A remedy, however, has been suggested of promising aspect, which, while it excludes the public authorities from the domain of religious freedom, will give to the sectarian schools of divinity the full benefit of the public provisions made for instruction in the other branches of science. * * * It has, therefore, been in contemplation, and suggested by some pious individuals, who perceive the advantages of associating other studies with those of religion, to establish their religious schools on the confines of the University, so as to give their students ready and convenient access and attendance on the scientific lectures of the University * * *. Such establishments would offer the further and greater advantage of enabling the students of the University to attend religious exercises with the professor of their particular sect, either in the rooms of the building still to be erected * * * or in the lecturing room of such professor."

Jefferson, therefore, saw no breach in the "wall of separation" resulting from nonpreferential aid to sectarian students.

Next to Jefferson, Madison ranks as probably the most significant spokesman on the meaning of the First Amendment. Possibly he should even be given foremost status since he was primarily responsible for the language of the Amendment. On June 8, 1789, Madison in the First Congress stated that his understanding of the meaning of the Amendment was that "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[5] In his *Detached Memoranda,* written some time after 1817, Madison wrote that the people of the United States "have the noble merit of first unshackling the

[5] 1 Annals of Congress 729-731 (Benton ed. 1858).

conscience from persecuting laws and of establishing among religious sects a legal equality."

Madison also was President of the United States for 8 years, during which time Federal funds supported military chaplaincies and missionaries to the Indians without criticism from the President.

Surely we can find no support in the writings and opinions of the formulators of and spokesmen for the First Amendment for the argument that public aid to children regardless of their religion constitutes an establishment of religion. Nor can any support be found for that proposition in the total record of the Presidents or the Congress.

As previously stated, Federal funds for missionaries to the Indians were first paid under Washington and continued until 1900 when changed conditions on the reservations, not constitutional problems, resulted in a change in the system. The First and Third Congresses, also under Washington, created the military chaplaincies for which Federal funds are still being paid. Under every Congress there have been chaplains in the House and Senate and in Federal institutions, such as hospitals and correctional institutions, and religious services are held at the United States military academies. Sectarian property and income is tax exempt; clergymen and divinity students have been made exempt from the draft, as are conscientious objectors; the Bible is used for administering of oaths; NYA and WPA funds were available to both public and sectarian schools during the depression period; religious organizations are given special postal privileges; and hospitals owned by religious organizations are eligible for aid under the Hill-Burton Hospital Construction Act.[6]

[6] Hill-Burton Act of 1946, 60 Stat. 1040, 42 U. S. C. §§ 29-92.

Many other Federal statutes have provided nondiscriminatory aid to students attending public and nonpublic schools, both directly and through the institutions they attend. Among these are the National School Lunch Act,[7] free milk under the Agriculture Act of 1949,[8] the National Defense Education Act of 1958,[9] College Housing Act of 1950,[10] the Higher Education Facilities Act,[11] the Higher Education Act,[12] the Elementary and Secondary Education Act,[13] the Surplus Property Act of 1944 which, as of 1961, had resulted in 488 grants of land and buildings to church-related schools of 35 denominations,[14] and the G.I. Bill of Rights.[15]

From this listing we must assume that either the Congress and the Presidents have been totally wrong under the Constitution or that the First Amendment prohibition of an establishment of religion does not bar nonpreferential aid to individuals solely because they attend sectarian institutions. It is submitted that this latter position is the real meaning of the "child benefit" theory (*Infra* "B").

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[7] 60 Stat. 230 (1946), 42 U. S. C. § 1751.

[8] 63 Stat. 1051 (1949), 7 U. S. C. § 1431.

[9] 72 Stat. 1580 (1958), 20 U. S. C. §§ 401-589.

[10] 12 U. S. C. §§ 1749-1749c.

[11] 77 Stat. 363 (1963), 20 U. S. C. §§ 701-757.

[12] 79 Stat. 1219 (1965), 20 U. S. C. §§ 1001-1144.

[13] 79 Stat. 27 (1965), 20 U. S. C. §§ 236-244, 331-332.

[14] 58 Stat. 765 (1944), 40 U. S. C. §§ 484(j) and 484(k); 107 Cong. Rec. 17351.

[15] 66 Stat. 663 (1952), 38 U. S. C. § 911.

B. Nonpreferential aid to students in both public and sectarian schools does not constitute an establishment of religion as defined by the decisions of this Court, but rather constitutes aid to the child alone.

Probably the earliest case to adopt the "child benefit" theory was *Cochran* v. *Board of Education* (281 U. S. 370 [1930]), which, while decided under the Fourteenth Amendment rather than the First, involved the provision of textbooks, by the State of Louisiana, to pupils in both public and sectarian schools. Holding that the expenditure of money for that purpose was not the taking of private property for a public purpose, this Court stated (pp. 374-375):

> "The purpose is said to be to aid private, religious, sectarian, and other schools not embraced in the public educational system of the State by furnishing textbooks free to the children attending such private schools. The operation and effect of the legislation in question were described by the Supreme Court of the State as follows (168 La., p. 1020):
>
> "'One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian or even public school. The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or non-sectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. *The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries.* It is also true that the sectarian schools, which some of the children attend, instruct their pupils in religion, and books are used for that purpose, but one may search diligently the acts, though without result, in

> an effort to find anything to the effect that it is the purpose of the state to furnish religious books for the use of such children * * *. What the statutes contemplate is that the same books that are furnished children attending public schools shall be furnished children attending private schools. This is the only practical way of interpreting and executing the statutes, and this is what the state board of education is doing. Among these books, naturally, none is to be expected, adapted to religious instruction.' " (Emphasis added.)

Of significance to a discussion of the meaning of the establishment clause in this regard are the concluding statements of the opinion (p. 375):

> "The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive."

Probably the most often quoted case, on both sides of the establishment argument, is the *Everson* case.[16] In that case this Court held that the nonpreferential provision of school bus transportation for children attending both public and nonpublic schools constituted an aid to the children, not to their respective schools, and did not constitute an establishment of religion. In so holding, this Court, in an opinion by Mr. Justice BLACK, expressed clearly the meaning of the "child benefit theory" and its compatibility with the First Amendment. Certain statements in the opinion, such as the following, are significant in placing the case in appropriate First Amendment context:

> "* * * the New Jersey legislature has decided that a public purpose will be served by using tax-raised funds to pay the bus fares of all school children, in-

[16] *Everson* v. *Board of Education*, 330 U. S. 1 (1947).

cluding those who attend parochial schools. The New Jersey Court of Appeals has reached the same conclusion. The fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need." (330 U. S., p. 6.)

"It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose . . . . The same thing is no less true of legislation to reimburse needy parents, or all parents, for payment of the fares of their children so that they can ride in public busses to and from schools rather than run the risk of traffic and other hazards incident to walking or 'hitchhiking'." (330 U. S., p. 7.)

"The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." (330 U. S., p. 18.)

The common factor in both the *Everson* and *Cochran* cases is that the program involved was a general nonpreferential program directed to aid all children regardless of their religious faith and not because of it. That this is significant, insofar as the validity of such programs under the Establishment Clause is concerned, is clear from the much quoted exposition of the meaning of that Clause by Mr. Justice BLACK in the *Everson* opinion (330 U. S., pp. 15-16):

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from

> church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' "

The common denominator in all the activities there stated to be prohibited is that the law, activity, or tax must be directed to the aid of religion as such. That opinion did not declare to be prohibited general public programs not intended or directed to the aid of religion which, by the fact that they incidentally aid adherents to a particular religion or to all religions, also incidentally or collaterally aid the religion.

Even more recently than *Everson,* a decision of this Court has clearly held that laws are not rendered invalid solely because there may be some indirect or collateral aid to proponents of a religious belief. In the Sunday-closing cases, this Court upheld the validity of laws making Sunday a universal day of rest in the face of the admittedly religious origin of those laws and the fact that their current enforcement incidentally aids certain religious denominations in the profession of their beliefs. In so holding, this Court interpreted the Establishment Clause "in the light of its history and the evils it was designed forever to suppress" (*McGowan* v. *Maryland,* 366 U. S. 420, 442 [1961]). The opinion further states (366 U. S. p. 442):

> "* * * the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions."

Furthermore, as this Court said in *Everson* (330 U. S., *supra*, p. 18):

> "That [First] Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."

Mr. Justice FRANKFURTER, concurring in *McGowan*, stated the purpose of the Establishment Clause to be simply to assure that religion, as religion, would not be made the object of legislation (366 U. S., p. 465). In this regard, he stated, the object of the legislation must be determined (366 U. S., pp. 466-467):

> "To ask what interest, what objective, legislation serves, of course, is not to psychoanalyze its legislators, but to examine the necessary effects of what they have enacted. If the primary end achieved by a form of regulation is the affirmation or promotion of religious doctrine-primary, in the sense that all secular ends which it purportedly serves are derivative from, not wholly independent of, the advancement of religion—the regulation is beyond the power of the state. This was the case in *McCollum*. Or if a statute furthers both secular and religious ends by means unnecessary to the effectuation of the secular ends alone—where the same secular ends could equally be attained by means which do not have consequences for promotion of religion—the statute cannot stand. A State may not endow a church although that church might inculcate in its parishioners moral concepts deemed to make them better citizens, because the very *raison d'être* of a church, as opposed to any other school of civilly serviceable morals, is the predication of re-

ligious doctrine. However, inasmuch as individuals are free, if they will, to build their own churches and worship in them, the State may guard its people's safety by extending fire and police protection to the churches so built. It was on the reasoning that parents are also at liberty to send their children to parochial schools which meet the reasonable educational standards of the State, *Pierce* v. *Society of Sisters*, 268 U. S. 510, that this Court held in the *Everson* case that expenditure of public funds to assure that children attending every kind of school enjoy the relative security of buses, rather than being left to walk or hitchhike, is not an unconstitutional 'establishment,' even though such an expenditure may cause some children to go to parochial schools who would not otherwise have gone."

Applying these decisions to the instant case, we observe the following factors. The intent of the statute was set forth in the statement of legislative policy in Chapter 320, New York Laws of 1965:

> "The security and welfare of the nation require the fullest development of the mental resources and skills of its youth. This calls for more adequate educational opportunities and increased efforts to educate more of the talent of our nation and requiring the correction of those imbalances in our educational programs which have led to an insufficient proportion of our population educated in the fields of science, mathematics, foreign languages and other non-sectarian subjects. The Congress of the United States has reaffirmed the principle that the states and local communities retain primary responsibility for public education. It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense, and the general welfare of the state."

It demonstrates a secular policy of providing better educational opportunity to all children through the provision

of free textbooks. Recognizing that parents have a constitutional right to send their children to sectarian schools, the Legislature could not fully attain the expressed secular end without including the large percentage of the total school population enrolled in sectarian schools (See Point II, *infra*). The aid is given directly to the students; it relieves the sectarian institution of no financial burden previously assumed. If, as an incidental effect, the provision of free textbooks makes it easier for parents to send their children to sectarian schools, that no more constitutes the establishment of a religion than does the provision of bus transportation or fire and police protection.

In summary, it must be observed as to the operation of the New York statute that no religious institution acquires property or funds through the State action, the textbooks belong to the public school districts and are loaned to pupils; the State, through the public school districts, retains complete control over the administration and expenditure of all public funds; and no religious texts or sectarian editions of the textbooks may be provided, so that no religious use may be made of the textbooks.

Consequently, it is submitted that the New York Court of Appeals correctly found that no aid to religion was provided and that the nonpreferential provision of textbooks to all children, enrolled in grades 7 through 12, regardless of the nature of the school attended, entailed only aid to the children and did not constitute an establishment of religion in contravention of the First Amendment to the United States Constitution.

POINT II

The provision of textbooks to all children enrolled in specified school grades constitutes a public welfare program of the State and providing access to that program to all children regardless of their religious faith, or lack of it, does not constitute an establishment of religion.

A.

Despite the baseless allegations of the appellants that the primary intent of New York's Textbook Loan Law was to aid sectarian schools, if one thing is at all clear from the statute itself and the record in this case is that *the sole intent of the statute is to aid all children to secure a better education* and that that intent constitutes a public purpose.

The power of the states to legislate and expend tax-raised funds for public purposes was amply expounded in this Court's opinion in the *Everson* case, *supra,* wherein it was stated (330 U. S., pp. 6-7):

> "It is true that this Court has, in rare instances, struck down state statutes on the ground that the purpose for which tax-raised funds were to be expended was not a public one. * * * But the Court has also pointed out that this far-reaching authority must be exercised with the most extreme caution. * * * Otherwise, a state's power to legislate for the public welfare might be seriously curtailed, a power which is a primary reason for the existence of states. Changing local conditions create new local problems which may lead a state's people and its local authorities to believe that laws authorizing new types of public services are necessary to promote the general well-being of the people."

The right of the states to legislate for the general welfare of their citizens having been recognized, must the

states then single out and exclude from the benefits of that legislation persons, otherwise eligible, whose adherence to a particular religious belief would be made easier because of an incidental effect of the program upon their religious practices? To state the question is to reject an affirmative response. In *Everson,* this Court stated the proposition in these words (330 U. S., p. 16):

> "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenents and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief."

Consequently, if improvement of secular educational opportunities for all children constitutes public welfare legislation, children cannot be excluded from the benefits of that legislation solely because they exercise a constitutional right to attend sectarian schools.

In 1947, this Court held that legislation intended to facilitate the opportunity of children to get a secular education did serve a public purpose (*Everson* v. *Board of Education, supra,* 330 U. S., p. 7). Is it any less a public purpose today?

In the case of *Matter of Weberman*[17] the New York Courts found the State's power over minors sufficient to sustain a law requiring all children, regardless of the school attended and regardless of the religious beliefs of the children or their parents, to be instructed "in at least the eleven common school branches (specified by statute) of arithmetic, reading, spelling, writing, the English language, geography, United States history, civics, hygiene, physical training and the history of New York State". Thus, the State has power to regulate reasonably the teaching of secular subjects in all schools, public and nonpublic. If a State may regulate the secular courses taught in all schools, may it not also provide the textbooks used by children in studying these courses?

In *Brown v. Board of Education* (347 U. S. 483 [1954]), the overwhelming significance of equality of educational opportunity was recognized by this Court when it stated (p. 493):

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to

[17] 198 Misc. 1055, 100 N. Y. S. 2d 60 (Sup. Ct., Kings County, 1950), affd. 278 App. Div. 656, 102 N. Y. S. 2d 418, affd. 302 N. Y. 855, app. dism. 342 U. S. 884.

provide it, is a right which must be made available to all on equal terms."

Both on the State and Federal level, the importance of education to the public welfare has been not only recognized but also emphasized as a matter of prime legislative concern.

President Johnson's State of the Union message to the Congress in 1965 proposed that, in accepting the challenge of the Great Society, the Nation begin with education, with "a program to insure every American child the fullest development of his mind and skills". In his message to the Congress on education, the President stated a national goal of full educational opportunity for every child in the land. As to that goal he stated:

> "We want this not only for his sake—but for the Nation's sake.
>
> "Nothing matters more to the future of our country; not our military preparedness, for armed might is worthless if we lack the brainpower to build a world of peace; not our productive economy, for we cannot sustain growth without trained manpower; not our democratic system of government, for freedom is fragile if citizens are ignorant."

In his special message to Congress preceding the introduction of the 1963 Federal aid to education bill, President Kennedy stated:

> "* * * from every point of view, education is of paramount concern to the national interest as well as to each individual. Today we need a new standard of excellence in education, matched by the fullest possible access to educational opportunities, enabling each citizen to develop his talents to the maximum possible extent."

Two years earlier, in 1961, also in a special message to the Congress concerning Federal aid to education, President Kennedy presented this vision to the people:

> "Our progress, as a nation, can be no swifter than our progress in education. Our requirements for world leadership, our hopes for economic growth, and the demands of citizenship itself * * * require the maximum development of every young American's capacity. The human mind is our fundamental resource."

In his Annual Message to the New York State Legislature in 1965, Governor Rockefeller observed on the subject of education:

> "New York State stands at the forefront of American education. It leads the Nation in the fullness and variety of opportunity it offers its youngsters for education of high quality and to the limit of their capacities. This decade of New York history already is destined to be marked as unique in its maximum effort to sustain and enlarge these opportunities without regard to race, color, creed or financial status.
>
> * * *
>
> "For today, as never before, the education of young men and young women determines their chance to make a maximum contribution to society."

In an address to the Livingston County Teachers Association on September 20, 1965, New York's Governor described "our most important responsibility" as "the responsibility of educating every young man and woman to the limit of his or her desire and capacity in order to assure equal opportunity for all to get ahead in this trying and competitive world."

Probably the most outstanding factor common to all the above-quoted statements is the emphasis upon universal educational opportunity for all children, and the omission

of direct concern with the school systems or buildings involved. There is no doubt, not only from the quoted policy statements but also from the decisions of this Court that education serves a public purpose and that legislation in the field of education is public welfare legislation.

B.

The next issue for consideration is whether textbook legislation, such as that involved in the instant case, also serves a public welfare need.

In his message on education, referred to above, President Johnson observed that "the cost of purchasing textbooks at increasing prices puts a major obstacle in the path of education—an obstacle that can and must be eliminated".

Testifying before the General Subcommittee on Education of the Committee on Education and Labor of the United States House of Representatives on January 22, 1965, Francis Keppel, commissioner of Education in the Department of Health, Education and Welfare, testified (Hearings, *op. cit.* p. 93):

> "When we turn to survey the needs of our schools for modern textbooks, we find that all too often our children must use textbooks which are out of date and grossly inadequate for this area of expanding educational horizons. It is a sad fact that 'modern history' books often have nothing to teach our children about events after World War I and that physics texts frequently deal with the state of our knowledge in the 1940's and 1950's—ignoring, for example, the atomic revolution.
>
> "For many families the purchase of a child's textbooks is a luxury they can ill afford. A 1964 study shows that one-fourth of the school systems in 128 of our largest cities do not provide free textbooks at the high school level. Nonpublic schools

> rarely provide free textbooks. A poor family with children in high school may be required to spend $15 to $20 or more per child for up-to-date textbooks—a prohibitive sum where money doesn't exist for many of the barest necessities of life. In 1961, parents spent over $90 million for textbooks—approximately 40 percent of that year's total expenditures for textbooks. Children in families unable to support this extra burden are often turned from the halls of the schools to the alleys of the slums."

That New York's Textbook Loan Law constitutes legitimate public welfare legislation, having a valid secular purpose, is made clearly apparent by application of the above-quoted factors. First, considering public schools alone in the 12 school districts or more which did not provide any free textbooks, the children and their parents were relieved of a substantial economic burden by the mandate that all districts provide free textbooks. Since the majority of the districts were city school districts, where the problem of the educationally deprived child is greatest, the importance of the legislation in terms of educational opportunity is readily apparent. Secondly, even as to those districts which did provide free textbooks, the legislation had significant effect upon the updating of textbooks by providing for full State reimbursement of cost up to $15 per child and partial reimbursement of expenditures in excess of that amount. Lastly, as to children attending sectarian schools it gave them access to this public welfare program, relieved their parents of the financial burden of purchasing textbooks and helped the children involved to achieve greater opportunities for a secular education.

Recognizing the sectarian school as a significant unit in a universal education system, the State cannot divest itself of all connection with it. To do so would be to defeat its own purpose and to exclude from the benefits and from

the teachings fundamental in American education those children who do not attend the public schools. The State would be obliged to keep rigidly aloof and have no part in the operation of the sectarian school. Lest this be so, and that education in those schools be comparable to that received in public schools, there must be cooperation between the State and the sectarian schools. Every instance of cooperation is, to be sure, in a sense "aid" to the denominational school, but every such instance is not forbidden aid. The approach must be realistic. The proper and desirable activities of the State in the interest of the health and welfare of its children cannot be withheld from some of them because they attend a denominational school:

> "Neither the Constitution nor the law discriminates against religion. Denominational religion is merely put in its proper place, outside of public aid or support. * * * The separation of the public school system from religious denominational instruction is thus complete." (*People ex rel. Lewis* v. *Graves*, 245 N. Y. 195, 198-199 [1927].)

As education has grown in this country and as government has increased its activities in the interest of the health and welfare of its people and of its children, it has brought within the sphere of its aid and control the denominational as well as the public school.

Indeed, it is the expansion of the government's role in all areas of American life which compels a re-examination of church-state problems. This expansion is true of both the Federal and State Governments and their activities. Government is assuming constantly broader authority in its spending, tax, and regulatory powers to meet human needs. This means that government is encroaching on areas of social concern that were at one time the special responsibility of voluntaristic societies, particularly the

churches. The churches have historically conducted a variety of welfare and charitable activities and have engaged in educational enterprises at all levels. The assumption by government of an increased responsibility for educational and welfare needs, the inability of voluntaristic groups to meet these needs, and the growing financial burden on private institutions in maintaining their programs—all lead to problems of vital concern respecting the constitutionality and propriety of governmental assistance to schools and colleges and to hospitals and other welfare enterprises conducted under church auspices.

The significance of this welfare concept in the statute involved in the case at bar is apparent from the policy statement set forth in Chapter 320 and quoted by the concurring Justices in the Appellate Division (A 52-53):

> "The security and welfare of the nation require the fullest development of the mental resources and skills of its youth. This calls for more adequate educational opportunities and increased efforts to educate more of the talent of our nation and requiring the correction of those imbalances in our educational programs which have led to an insufficient proportion of our population educated in the fields of science, mathematics, foreign languages and other non-sectarian subjects. The Congress of the United States has reaffirmed the principle that the states and local communities retain primary responsibility for public education. It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense, and the general welfare of the state."

New York's legislative history also shows the incorporation of denominational schools within the State's ambit of educational concern:

For example, in the State of New York denominational schools are chartered by the Board of Regents (N. Y. Education Law, § 216). There is regular inspection by the Education Department of the nonpublic as well as the public school (N. Y. Const., Art. XI, § 3; N. Y. Education Law, § 305 [2]). The sectarian school is exempt from taxation (N. Y. Const., Art. XVI, § 1; N. Y. Real Property Tax Law, § 420). Attendance at a nonpublic school complies with the compulsory education law (N. Y. Education Law, § 3204) and satisfies the requirements for part-time attendance (N. Y. Education Law, § 4601) Terms of attendance in the nonpublic as well as the public school are prescribed (N. Y. Education Law, §§ 3204-3205), and certain curriculum requirements are imposed (N. Y. Education Law, §§ 3204, 801, 803, 806-808, 3002).

These are all aspects of the inclusion of the sectarian school in the universal education program. Some of them have the semblance of aid to the sectarian school; others of discipline of the school. If the divorce of the State from the sectarian school must be total, the State could not extend the provisions of any of these statutes to it. The principle of separation of church and state must ever remain inviolate in these United States; and it has so remained although the several states, under the police power, have legislated in a variety of respects for the welfare of children in the denominational as well as in the public schools. The provision of textbooks to pupils in both public and nonpublic schools does not spell danger to that principle, although philosophically theoretical arguments may be spun showing a remote and incidental benefit to the sectarian school which the child receiving the books attends.

C.

In applying the principle of separation of church and state to particular fact situations, the first test is whether or not government is directing its program to an appropriate secular end. This was made clear in the Sunday-closing cases where this Court found statutes valid which had as their ultimate aim the promotion of the appropriate secular objective of having a single day of rest during the week (*McGowan* v. *Maryland, supra; Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U. S. 582 [1961]; *Gallagher* v. *Crown Kosher Super Market, Inc.*, 366 U. S. 619 [1961]; *Braunfeld* v. *Brown*, 366 U. S. 599 [1961]). In the Court's opinion in *McGowan*, it was stated as to the Sunday-closing laws (366 U. S., p. 445):

> "The present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State."

Applying these principles to the instant case, it is apparent that the secular end expressed in New York's Textbook Loan Law, of adequate educational opportunities for all children, without any intent of promoting or aiding sectarian education, meets the test of separation of church and state.

Religion, under the decisions of this Court, may not be used as a basis for classification in order to aid or hinder religious activity. The effect of the Establishment and

Free Exercise Clauses is to neutralize the religious factor as a basis of government classification. This was stated in this Court's opinion in *Everson* (330 U. S., p. 18):

> "That [First] Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."

This neutrality position was reaffirmed in *Abington School District* v. *Schempp; supra,* wherein Mr. Justice CLARK, writing for the Court, stated (374 U. S. 214-215, 222):

> "Almost a hundred years ago in *Minor* v. *Board of Education of Cincinnati,* Judge Alphonso Taft, father of the revered Chief Justice, in an unpublished opinion stated the ideal of our people as to religious freedom as one of
>
> 'absolute equality before the law, of all religious opinions and sects * * *.
>
> * * *
>
> 'The government is neutral, and, while protecting all, it prefers none, and it *disparages* none.'
>
> * * * *
>
> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

The Free Exercise Clause, then, does not state an independent substantive concept of religious liberty but makes clear that there shall be no discrimination on religious

grounds in the enjoyment of legal rights and privileges. In turn, the Establishment Clause precludes aid to religion as such but not aid extended to religious activities incidental to a broader classification which rests on a legitimate secular basis.

Mr. Justice BRENNAN, concurring in the *Schempp* case, offered another test by which legislation could be measured against the Establishment Clause (374 U. S. at pp. 294-295):

> "What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice."

Under any of these tests, the lending of secular textbooks to all children, aimed at achieving a secular result of adequate educational opportunities for all children, does not constitute a violation of the First Amendment.

New York in the Textbook Loan Law has remained neutral as to religion, it does not discriminate on the basis of a child's religion or lack of it, it merely provides him access to free secular textbooks without regard to the nature of the school he attends.[18]

While it may be *argued* that New York's Legislature could have achieved its secular purpose by providing textbooks only to pupils in public schools, that Legislature

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[18] Except that the school attended must comply with the compulsory education law, which means merely that it must be a full time day school teaching the areas of learning required by law, and does not relate to how well it is administered, as appellants and *amici* contend (N. Y. Education Law, § 3204).

apparently concluded that it could not accomplish its secular purpose without including children in sectarian schools, if only because of the substantial percentage of the total pupil population represented by these children.

In 1961, Charles Silver, the former President of the Board of Education of the City of New York, during Congressional Hearings on the then proposed Federal Aid to Education Act, testified that nonpublic schools in New York City enrolled at that time approximately 450,000 children in all grades—or one out of every three children in schools in New York City.

Statewide, for the school year ending June 30, 1967, there were enrolled in public schools in grades 7 through 12 in New York 1,383,703 children and in non-public schools 337,929. Consequently, approximately 20 percent of the children in this State in those grades attend nonpublic schools. Whether any program aimed at achieving equality of educational opportunity for all children could legitimately exclude 20 percent of the State's children could be seriously challenged.

Since the provision of secular textbooks constitutes valid public welfare legislation and New York's statute makes those textbooks available to all children without regard to their religious faith or lack of it, the fact that New York does not specifically exclude children attending sectarian schools does not make the statute unconstitutional or constitute an establishment of religion. New York may constitutionally include children attending sectarian schools in a nonpreferential welfare program and has done so in the Textbook Loan Law.

POINT III

Expenditure of general tax money for textbooks to be provided to all children regardless of the school they attend does not violate the "free exercise" clause of the First Amendment solely because some children receiving the books attend sectarian schools.

Appellants contend on this appeal that to the extent tax money is used to purchase and loan textbooks to pupils attending sectarian schools, it violates the Free Exercise Clause of the First Amendment on the ground that taxpayers who disagree with the religious beliefs taught in any or all of those schools are compelled to contribute to "the propagation of opinion" with which they disagree.

Initially it must be remembered that the moneys expended are for *secular* texts. The books loaned must be those already designated for use in public schools or approved by a public school board. The opinion of counsel of the Education Department of the State of New York, printed as an appendix to appellants' brief, specifically directs the public school districts that they are not to provide denominational editions or those carrying the "imprimatur" or "nihil obstat" of any religious authority. Thus, the texts cannot be such as contribute to the propagation of any religious belief.

Appellants also attempt to compare the provision of secular textbooks with a tax to support a religion, as was attempted by Virginia in 1784 and which resulted in Madison's famous "Memorial and Remonstrance against Religious Assessments" and Jefferson's "Bill for the Establishment of Religious Freedom". Yet once again the moneys used to purchase secular textbooks are not spent in the support or propagation of any religion.

The tax funds involved in the Textbook Loan Law are not spent for the benefit of any religious institution or doctrine. They are spent to provide secular textbooks to students attending both public and nonpublic schools. They relieve the sectarian schools of no obligation which the institutions had formerly assumed since on the record in this case, the parents purchased the books, not the sectarian schools. No public money is being spent for the payment of religious costs or for religious purposes and the argument advanced by the appellants must fall on this ground alone.

How far the appellants must reach to advance their argument under the Free Exercise Clause is clearly indicated by their attempt to equate the defeat of New York State's proposed new constitution in 1967 with the church-state issue (Applts.' Brief, p. 35). It is true that the proposed repeal of the so-called Blaine Amendment[19] created considerable public debate, but there were many other issues involved in the defeat, such as the submission of the proposed constitution to the voters in a "take it or leave it" package without giving them separate votes on important questions, the proposed lowering of the voting age, court reorganization, free college tuition, State assumption of all welfare costs and control over local welfare agencies, the denial to the people of the right to vote on the contracting of State indebtedness, and many other provisions, all of which contributed to the defeat of the constitution. Of particular significance on this issue is the fact that 40 percent of the State's voters are estimated to be Catholic, without regard to adherents of other religious denominations which have denominational schools, and yet less than ⅓ of the State's voters voted for the constitution. Obvious-

[19] N. Y. Const. Art. XI, § 3 prohibits the use of public money or property directly or indirectly in aid of sectarian educational institutions.

ly the religious issue did not control the outcome of the voting. The projection of that issue into this case is a mere mirage—a thing of no substance or reality.

Conversely, however, it may well be argued that the denial to a child of access to a general public program, solely because he attends a sectarian school, violates his rights to the free exercise of *his* religion.

Compulsory education is one of the basic concepts of the American way of life. It is encouraged and supported by the people. The free American, however, also cherishes his right to have a voice in the education of his child, and to that end, to choose the type of school which his child shall attend. Many prefer the denominational or private school instead of the public school. Indeed, this Court has held that a state may not enact legislation compelling attendance of children at a public school (*Pierce* v. *Society of Sisters,* 268 U. S. 510 [1925]). That case involved a statute which made attendance at public schools within the State compulsory. This Court held the law invalid as an unreasonable interference with the right of parents to control the education of their children and warned (pp. 534-535):

> "As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

The sectarian school is thus recognized as legally equivalent to the public school system so far as compulsory attendance is concerned. Children of this country attend sectarian schools. It has been said that the same spirit of democracy which nurtured public education in this country has inspired the development of the sectarian school. The elimination of any religious instruction from the public schools in this democracy has caused parents, who prefer that their children receive instruction of this nature, to maintain the sectarian schools.

Not only do children have a right to attend sectarian schools, they also have a right not to be penalized for attending such schools. Denial of access to general public welfare programs solely because the children attend sectarian schools can be construed as a penalty imposed upon them because of their religion and consequently a violation of their right to the free exercise of their religion. This contention is clearly supported by this Court's holding in *Sherbert* v. *Verner* (374 U. S. 398 [1963]), decided at the same term as the *Schempp* case, *supra*.

In that case, the State of South Carolina denied unemployment benefits to a claimant solely on the ground that she refused to take employment which required her to work on Saturday because her religious beliefs, as a Seventh Day Adventist, required her to refrain from work on that day. Holding that the denial of benefits was unconstitutional as to the appellant therein, this Court expounded upon the interrelation between the Free Exercise Clause and public welfare legislation (pp. 403-404):

> "We turn first to the question whether the disqualification for benefits imposes any burden on the free exercise of appellant's religion. We think it is clear that it does. In a sense the consequences of such a dis-

qualification to religious principles and practices may be only an indirect result of welfare legislation within the State's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end, of our inquiry. For '[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.' *Braunfeld* v. *Brown, supra,* at 607. Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

"Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege.' It is too late in the day to doubt that the liberities of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."

Here, too, a child, whose religious beliefs impel him to attend a denominational school, would, if because of that attendance he would be excluded from the benefits of New York's Textbook Loan Law, be compelled to choose between following the precepts of his religion and forfeiting benefits on one hand or abandoning one of the precepts of his religion to secure the benefits. This would constitute an impairment of his right to the free exercise of his religion.

In the light of the Sherbert decision above quoted, we submit that the denial of a child's access to a nonpreferential public program providing secular textbooks to all children solely because that child attends a sectarian school would be unconstitutional and that New York cannot constitutionally deprive that child of the right to receive those textbooks and has not done so.

CONCLUSION

The judgment appealed from should be affirmed.

Dated: March 27, 1968.

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Appellee,
James E. Allen, Jr.
The Capitol
Albany, N. Y. 12224

RUTH KESSLER TOCH
Solicitor General

JEAN M. COON
Assistant Attorney General

of Counsel

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No. 660

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In the Supreme Court of the United States

OCTOBER TERM, 1967

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACH, SAND LAKE AND NORTH GREENBUSH, RENSSELAER COUNTY AND CHATHAM, COLUMBIA COUNTY; AND BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3, TOWNS OF NORTH HEMPSTEAD AND OYSTER BAY, NASSAU COUNTY, NEW YORK, APPELLANTS

v.

JAMES E. ALLEN, JR., AS COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, APPELLEE, AND MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH, AND BARBARA BRENNAN, INTERVENOR-APPELLEES

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ERWIN S. GRISWOLD,
Solicitor General,
EDWIN L. WEISL, JR.,
Assistant Attorney General,
LAWRENCE G. WALLACE,
PHILIP A. LACOVARA,
Assistants to the Solicitor General,
ALAN S. ROSENTHAL,
ROBERT V. ZENER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The opinions of the New York Court of Appeals (App. 63a) are reported at 20 N.Y. 2d 109, 281 N.Y.S. 2d 799, 228 N.E. 2d 791. The opinions of the Supreme Court of New York, Appellate Division, Third Department (App. 45a), are reported at 27 App. Div. 2d 69, 276 N.Y.S. 2d 234. The opinion of the Supreme Court of New York, Albany County (App. 29a), is reported at 51 Misc. 2d 297, 273 N.Y.S. 2d 239.

JURISDICTION

The judgment of the New York Court of Appeals (App. 61a) was entered on June 1, 1967. The notice of appeal was filed on August 17, 1967. Probable jurisdiction was noted on January 15, 1968 (389 U.S. 1031). The jurisdiction of this Court rests on 28 U.S.C. 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *.

Section 701.3 of the New York Education Law is set forth at pp. 2–3 of Appellants' Brief.

QUESTION PRESENTED

Whether Section 701.3 of the New York Education Law, providing for the loan of secular text books to any student who attends grades seven through twelve of a public or private school that meets state standards and who individually requests such books, violates the First Amendment insofar as books may be loaned to children attending sectarian schools.

INTEREST OF THE UNITED STATES

It is the policy of the United States to improve the quality of education and to promote the maximum availability and utilization of educational resources.[1] In furtherance of these goals and after years of careful study and national debate, Congress enacted

[1] For example, under Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 241a *et seq.*, a wide variety

the Elementary and Secondary Education Act of 1965. Title II of this Act, 20 U.S.C. (Supp. II) 821 *et seq.*, authorizes grants to States which submit plans for the acquisition of library resources for the use of children and teachers in public and private elementary and secondary schools. 20 U.S.C. 823. Under this federal Act, just as under the New York statute at issue, publicly purchased textbooks are lent for use in sectarian schools. While the two statutes differ in organization and administration, so that the outcome of the present appeal will not necessarily answer similar questions arising under the federal Act, both statutes manifest the same legislative concern for general improvement of educational opportunities, and both involve similar constitutional values.

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of local programs to aid the education of children at all schools, including sectarian schools, are financed with federal funds.

The National Defense Education Act authorizes: grants to private colleges—including sectarian colleges—for low-interest student loans and fellowships (20 U.S.C. 421 *et seq.*, 464); loans to private schools, including sectarian schools, for acquisition of science, mathematics, and foreign language equipment (20 U.S.C. 441 *et seq.*); grants to State educational agencies for the testing of children in private schools, including sectarian schools (20 U.S.C. 481 *et seq.*); contracts with colleges for training programs to improve the qualifications of counselors and foreign language teachers at private schools, including sectarian schools (20 U.S.C. 481, 511); grants to colleges, including sectarian colleges, for the establishment of foreign language teaching centers (20 U.S.C. 511(a)).

The G.I. Bill of Rights provides for tuition grants to vet-

STATEMENT OF THE CASE

Appellants are two local boards of education in New York State which sued appellee State Commissioner of Education, seeking a determination that Section 701.3 of the New York Education Law is void and thus need not be followed by them. This statute authorizes the loan of textbooks to children enrolled in grades 7 through 12 of public or private schools complying with the compulsory education law, upon the individual request of the child. The textbooks which may be loaned are those "designated for use in any public, elementary or secondary schools of the state or * * * approved by any boards of education, trustees or other school authorities." The New York Court of Appeals construed the statute to require that the textbooks be "secular" and "nonreligious" (App. 67a). The State Education Department has specified that the texts must be "non-sectarian," thus excluding "denominational editions" and "those carrying the 'imprimatur' and 'nihil obstat' of a religious authority". See Opinion of Counsel No. 181 (Appellants' Brief, pp. 4a, 5a).

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erans, including those attending sectarian schools (38 U.S.C. 1601 *et seq.*).

The National School Lunch Act provides for grants to purchase lunches for children at private schools, including sectarian schools (42 U.S.C. 1751 *et seq.*).

The Higher Education Facilities Act of 1963 provides for grants and loans to universities, including sectarian universities, for construction of academic facilities (20 U.S.C. 701 *et seq.*).

See, generally, Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 Cal. L. Rev. 260, 338–340.

The New York Court of Appeals, by a divided vote, upheld the validity of the statute.[2] The court found no incompatibility with the First Amendment,[3] because the statute is "completely neutral with respect to religion", making the textbooks available to children attending all types of schools (App. 67a). The court analogized the textbook program to the maintenance of public libraries (App. 66a). Moreover, the court determined that the

> purpose underlying section 701, found in the Legislature's own words (L. 1965, ch. 320, § 1 * * *), belies any interpretation other than that the statute is meant to bestow a public benefit upon all school children, regardless of

[2] In the state courts, one of the principal issues was the standing of the appellants. Standing was premised on the fact that the State Commissioner of Education may remove from office any school board member who fails to comply with any section of the Education Law, and may withhold public moneys from any school district whose school board fails to comply with any section of that Law. New York Education Law, Sections 306, 1706. The Appellate Division had directed dismissal of the complaint for want of standing (App. 45a), but a majority of the court of appeals concluded that in these circumstances local school boards may sue a State official (App. 64a, n. 1). Standing to litigate in this Court is, however, an independent federal question. *Doremus* v. *Board of Education*, 342 U.S. 429.

[3] The dissenting judges were of the view that Section 701.3 violated the New York State Constitution which has been construed to prohibit State programs permitted by the federal constitution. Compare *Judd* v. *Board of Education*, 278 N.Y. 200, with *Everson* v. *Board of Education*, 330 U.S. 1. The dissenters did not reach a firm conclusion concerning the status of this section under the First Amendment, observing that even if the State Constitution followed federal standards "it is by no means clear that the result would be different * * *" (App. 71a).

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> their school affiliations. There can be no serious suggestion that the declaration of purpose by the Legislature was a verbal smoke screen designed to obscure a nefarious scheme to circumvent the New York State Constitution. * * * [App. 66a.]

Addressing itself to the effect of the program, the majority concluded that "any benefit accruing to those [parochial] schools is a collateral effect of the statute, and, therefore, cannot be properly classified as the giving of aid directly or indirectly" (App. 66a). And the practical effect of excluding private school children from the benefits of Section 701 was seen as likely to be a widening of "the gap between those children in deprived areas who attend parochial schools and those attending public schools in the same areas who receive the benefits of all the many and necessary programs backed by the massive resources of both State and Federal Governments" (App. 67a–68a).

This appeal followed.

SUMMARY OF ARGUMENT

New York has an undeniable interest in the quality of education provided children attending schools in New York, whether those schools be public or private, sectarian or non-sectarian. This interest has long been reflected in state statutes which impose minimal standards upon all schools operating in New York. The statute here in question—one which undertakes to lend textbooks of an entirely secular nature to schoolchildren in specified grades, regardless of the school they may attend—has the same basic justification:

That it is in furtherance of a valid, secular governmental purpose.

The Textbook Program does not give aid to sectarian institutions or sponsor the propagation of religion. Since the purpose and effect of furnishing the books are secular, the state is free to extend the benefits to all children; as *Everson* v. *Board of Education,* 330 U.S. 1, and subsequent decisions of this Court demonstrate, it is not required in such circumstances to exclude those children who choose to attend denominational schools. New York has recognized that the First Amendment effects a separation between church and state; but it has also correctly recognized that the Constitution demands no wall of separation between the state and children who are its citizens.

The appellants' invocation of the Free Exercise clause adds nothing to their claims under the Establishment Clause. No rights of the appellants to adhere to, or to refrain from, religious beliefs or practices are at stake in this case.

ARGUMENT

Under the tests that have been utilized by this Court to assure compliance with the Establishment Clause of the First Amendment, a governmental program designed to provide secular educational materials to all school-age children, including those who are students in sectarian schools, is a valid exercise of the power to make expenditures for the general welfare. At the outset, we emphasize that this case is far removed from any hypothetical appropriation to build a cathedral or synagogue, or even to construct a sectarian

school. The constitutional question here is only whether the government may make available on a nondiscriminatory basis certain learning materials which are devoid of sectarian content, when individual students request temporary access to them. No part of this statutory plan focuses on religion, or even on religiously affiliated institutions; instead, the program maintains a strict neutrality toward religious institutions, neither conferring benefits or advantages on them, nor denying children the opportunity to participate merely because they attend sectarian schools.

I. TEXTBOOK AID TO PRIVATE AS WELL AS PUBLIC SCHOOL PUPILS IS IN FURTHERANCE OF A VALID, SECULAR LEGISLATIVE PURPOSE

Ever since the establishment of a public school system in this country,[4] it has been recognized that the quality of education received by the youth of the nation is a matter of vital public concern.[5] In recent

[4] See *Everson* v. *Board of Education*, 330 U.S. 1, 23 (Jackson, J., dissenting); *McCollum* v. *Board of Education*, 333 U.S. 203, 214–215 (opinion of Frankfurter, J.).

[5] In 1835, Thaddeus Stevens opposed a proposal in the Pennsylvania legislature to repeal a law enacted the previous year permitting school districts to levy taxes for support of public schools. Stevens said, in a widely distributed speech:

"If an elective republic is to endure for any great length of time, every elector must have sufficient information, not only to accumulate wealth and take care of his pecuniary concerns, but to direct wisely the Legislature, the Ambassadors, and the Executive of the Nation; for some part of all these things, some agency in approving or disapproving of them, falls to every freeman."

Quoted in Pfeffer, *Church, State, and Freedom* (rev. ed., 1967) at 327–328.

years, this concern has intensified with the realization that inadequate education is a serious social problem,[6] and that inadequate education may result in a shortage of the skilled personnel required in today's economy. See National Defense Education Act of 1958, Section 101 ("Findings and Declaration of Policy"), 72 Stat. 1581. The New York Textbook Law reflects this concern. In its preamble, the Legislature declared:

> The security and welfare of the nation require the fullest development of the mental resources and skills of its youth. This calls for more adequate educational opportunities and increased efforts to educate more of the talent of our nation and requiring the correction of those imbalances in our educational programs which have led to an insufficient proportion of our population educated in the fields of science, mathematics, foreign languages and other non-sectarian subjects. * * * It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state.

Laws of New York 1965, ch. 320, section 1.

There can be no doubt that the Textbook Law thus was enacted for a legitimate, secular purpose. While, undeniably, the major focus of public concern for edu-

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[6] See *Report of the National Advisory Commission on Civil Disorders*, chap. 17, part II (1968); *Equality of Educational Opportunity*, United States Department of Health, Education, and Welfare, Office of Education (the "Coleman Report"), *passim* (1966).

cation is upon the public school system, this Court, in *Cochran* v. *Board of Education,* 281 U.S. 370, recognized that the public also has a legitimate interest in the quality of the education of those children who attend private schools, including sectarian schools. When the New York Textbook Law was amended in 1965 to require all school boards to lend textbooks and to include private school pupils in the program, over 20 percent of the pupils in grades 7–12 were enrolled in private schools,[7] and unquestionably a high proportion of these children attend sectarian schools.[8] A holding that the state must exclude these children would necessarily impair the state's ability to assure that all New York children are provided adequate educational opportunities.

In fact, far from ignoring the children attending sectarian and other private schools, the State of New York has long manifested its concern with the quality of their education. Under the state's compulsory education law, all minors between the ages of seven and sixteen are required to attend school full-time and, if not in attendance at a public school,

[7] The Legislative Memorandum of the State Department of Education on the 1965 amendment to the Textbook Law, which extended aid to private school pupils, stated that in grades 7–12 (the grades covered by the Law), there were in New York State approximately 1,352,000 pupils attending public schools and 315,000 attending private schools. McKinney's 1965 Session Laws at p. 2056.

[8] In the country as a whole over twelve percent of the student population attend Roman Catholic parochial schools. National Catholic Welfare Conference, *The Constitutionality of the Inclusion of Church-related Schools in Federal Aid to Education,* 50 Geo. L.J. 397, 443–444 (1961).

must be given instruction "at least substantially equivalent" to the instruction given in public schools. N.Y. Education Law, Sections 3204, 3205. Thus sectarian schools are bound by law to maintain a curriculum substantially equivalent to the course of study prescribed by statute for the first eight years of public school: "arithmetic, reading, spelling, writing, the English language, geography, United States history, civics, hygiene, physical training, the history of New York state and science." N.Y. Education Law, Section 3204.3a(1) (1967 Cum. Ann. Pocket Pt.).[9] The statute also requires that these subjects be taught in English. Education Law, Section 3204.2.

The 1965 amendment to the New York Textbook Law represents a considered judgment by the New York Legislature that the State's interest in the quality of education received by students attending private schools, including sectarian schools, is not sufficiently assured by the compulsory education law, and that the goal of improving educational opportunities for all students in the higher elementary and in the secondary grades will best be promoted by allowing pupils enrolled in sectarian schools the same access to secular textbooks that the State has undertaken to provide for their fellows attending public and other private schools. We submit that nothing in the Con-

[9] Additional requirements are laid down by the statute for courses beyond the first eight years, *e.g.*, the requirement of instruction in "American history including the principles of government proclaimed in the Declaration of Independence and established by the Constitution of the United States." N.Y. Education Law, Section 3204.3a(2).

stitution requires the courts to override this legislative judgment.

II. THE LEGISLATIVE DECISION TO LEND SECULAR TEXTBOOKS TO STUDENTS ATTENDING ALL ACCREDITED SCHOOLS, INCLUDING SECTARIAN SCHOOLS, PERMISSIBLY ACCOMMODATES VALID STATE OBJECTIVES WITH THE VALUES PROTECTED BY THE ESTABLISHMENT, FREE EXERCISE, AND EQUAL PROTECTION CLAUSES

This case involves the interplay of three constitutional provisions, each of which is designed to protect a distinct and unquestioned value. Yet in particular situations these provisions may overlap or point in different directions.[10] The Establishment Clause of the First Amendment seeks to preserve the dignity of both Church and State by excluding the State from the peculiar concerns of the Church; thus it ordains that government may not lend its power, prestige, or sanction to the advancement of any or all religion. The Free Exercise Clause complements this policy by requiring that the State scrupulously refrain from impairing the individual's conscientious judgment in matters of religion; therefore, government may not impede the practice of religion or penalize individuals because of their religious beliefs. Finally, the Constitution contains the broad injunction that no person shall be deprived of the equal protection of the laws, a guarantee which requires that the State's objectives

[10] See *Everson* v. *Board of Education*, 330 U.S. 1, 16; *Engel* v. *Vitale*, 370 U.S. 421, 430; *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 222.

be pursued in a manner which avoids invidious discrimination."[11]

This Court has repeatedly recognized that the task of reconciling these constitutional commands is not exclusively a judicial concern and that the legislative branch plays an important role in the numerous determinations of policy which affect Church-State relations. It has found the solution to these delicate relationships by affording the legislature a measure of discretion and choice in those situations in which all of the legislative alternatives inevitably will result in some marginal loss of values underlying either the Establishment or Free Exercise clauses. Thus, this Court had held that the Constitution neither forbids nor requires the inclusion of parochial school children in the State's bus transportation program, *Everson* v. *Board of Education,* 330 U.S. 1, 16. For similar reasons, the Constitution neither forbids nor requires exemptions for Sabbatarians in those states which choose to have Sunday closing laws. *Braunfeld* v. *Brown,* 366 U.S. 599, 608–609 (opinion of Chief Justice Warren). See, also, *Zorach* v. *Clauson,* 343 U.S. 306, 314. For reasons which we elaborate, the New York textbook program does not transgress the constitutional limitations which circumscribe this area of legislative discretion.

[11] See *Everson* v. *Board of Education*, 330 U.S. 1, 4 n. 2; *McGowan* v. *Maryland*, 366 U.S. 420, 425–428; *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582, 589–592; *Gallagher* v. *Crown Kosher Super Market, Inc.*, 366 U.S. 617, 622–624.

A. NEITHER THE PURPOSE NOR THE PRIMARY EFFECT OF THE NEW YORK TEXTBOOK LOAN STATUTE IS THE ADVANCEMENT OF RELIGION

As stated some twenty years ago in *Everson* v. *Board of Education,* 330 U.S. 1, the critical task in applying the Establishment Clause is to draw "the line between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion." 330 U.S. at 14. Cf. *Braunfeld* v. *Brown,* 366 U.S. 599, 605. Of course, that formulation was not intended to provide a litmus test for separating constitutional from unconstitutional programs; it points toward the relevant considerations but does not determine how they are to be applied. In what has now become an increasingly lengthening line of cases, this Court has elaborated the criteria. It observed in *McGowan* v. *Maryland,* 366 U.S. 420, 443–444, that the public financing of transportation had been upheld in *Everson* because the "purpose and effect of the statute in question" was a general public welfare measure. See also *Torcaso* v. *Watkins,* 367 U.S. 488, 489. In the words of the Court's most recent Establishment decision (*Abington School Dist.* v. *Schempp,* 374 U.S. 203, 222):

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment

> Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. * * *

In the present case, the court below examined the background as well as the structure of Section 701.3 and concluded that the "purpose" of the enactment was unquestionably the objective of conferring neutral secular benefits on all school children, and was not a subterfuge intended to avoid constitutional limitations (App. 66a, quoted *supra*, pp. 5–6). The court similarly determined that the statute's scope extends no further than the non-discriminatory loan of secular textbooks selected by public officials, to be made available only when individual students request them (App. 66a–67a). In this light, it was decided that there is no direct contribution to parochial schools, but only to the students who attend them;[12] and the court therefore assessed the operative effect of the program as not constituting even indirect aid to religion. "[A]ny benefit accruing to those schools is a collateral effect of the statute" and nothing more (App. 66a). Cf. *Everson* v. *Board of Education*, 330 U.S. 1, 16–18.

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[12] On this point it is important to correct the misimpression created by appellants' assertions that furnishing even secular textbooks enables "parochial schools to purchase religious books with the funds saved * * *" (see Appellants' Brief, pp. 7, 17). This statute, as written and as applied (see Opinion of Counsel No. 181, Appellants' Brief, p. 9a), provides for loans to pupils on their request, not to schools, and indeed it is uncontested (App. 14a) that before the passage of the statute the pupils attending sectarian schools in appellants' districts had to purchase all of their textbooks and did not have them furnished by their schools.

The court below has thus reached its decision in accordance with the guiding principles that this Court has enunciated. And of course the authoritative findings and declarations of the State's highest court, in thus assessing the purpose and effect of a state statute, are given great weight by this Court. See *McGowan* v. *Maryland*, 366 U.S. 420, 429; cf. *Reitman* v. *Mulkey*, 387 U.S. 369, 373–374, 381.

Nor are there any persuasive considerations undermining the validity of the state court's conclusions. There is no rational or record support for appellants' conclusory assertion that "a primary purpose of the Textbook Law to the extent it applies to parochial schools is to assist such schools in teaching religion." (Brief, pp. 24–25.) Not only is this contention directly contrary to the Legislature's express purpose and to the finding of purpose made by the court below; it is also belied by the face of the statute, which (1) authorizes book loans to students in all schools, without singling out parochial school children for favored treatment; (2) requires that the texts be of a wholly secular nature; and (3) requires that they be made available not to the school but to the individual student who makes a personal request. For reasons set forth in Point I, *supra*, it is too late in our constitutional development to argue in the face of such circumstances that, as a matter of law, inclusion of parochial school children in such a program is inconsistent with a valid secular purpose.[13]

[13] We note that in *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 225, the Court specifically declared that in certain circumstances even the study of the Bible or of religion in a

Appellants also assert that there "is no such thing as secular education in a sectarian elementary or secondary school"—that the "whole curriculum is permeated by religion" (Brief p. 16). Even if this sweeping statement could be taken as an accurate description of the curricula of all sectarian schools of all denominations,[13a] it fails to sustain the appellants' contention. It overlooks the crucial fact that the textbooks themselves, which are all that the State provides, do not reflect a religious point of view. Of course, a particular recipient of a secular textbook, including a public school child, may color his reading and interpretation of the book with his religious outlook. On the other hand, a non-Catholic child who attends a parochial school for non-religious reasons may reject that Church's teachings about his secular textbooks. Yet surely the State, in pursuing its objective of providing all school children with secular textbooks, need not be hobbled with inquiries about individual children's religious beliefs and receptivity to religious interpretations. In fact, such inquiries would themselves raise serious constitutional problems. See, *e.g.*, *Kreshik* v. *St. Nicholas Cathedral,* 363 U.S. 190; *Torcaso* v. *Watkins,* 367 U.S. 488; *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94; *Watson* v. *Jones,* 13 Wall. 679. It is sufficient that the State has taken measures to assure that the textbooks it furnishes to the children are entirely secular in con-

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public school could constitute "part of a secular program of education" consistent with the First Amendment. This would seem to preclude appellants' suggestion that lending a *secular* textbook to any child in any school affiliated with any denomination must inevitably be intended to "assist * * * teaching religion."

[13a] See, generally, Choper, *supra*, n. 1, at 291–303.

tent and that it has refrained from sponsoring or financing any religious interpretation of them that may occur.

This Court has made it clear that legislation designed to achieve a valid secular purpose does not run afoul of the Establishment Clause because an incidental effect [14] of the legislation may be to facilitate the practice of religion. Sunday closing laws are valid even though they undoubtedly have a religious origin and may benefit churches which hold services on Sunday. *McGowan* v. *Maryland,* 366 U.S. 420. Churches unquestionably benefit from governmental services designed to promote the general welfare—such as police and fire protection, sewage disposal, and public maintenance of highways and sidewalks. See *Everson* v. *Board of Education,* 330 U.S. 1, 17–18. Few would question the validity of the school lunch program, although the lunches may be served on school property. See National School Lunch Act, 42 U.S.C. 1751 *et seq.* And, of course, this Court has sustained the inclusion of sectarian school children in a school busing program, *Everson* v. *Board of Education, supra.* As recognized in *Everson,* such general programs can in a sense be said to aid sectarian schools, since without them it would be "more difficult for the schools to operate." 330 U.S. at 18. Yet, they are not, for that reason, impermissible.

It has been suggested, however, that "welfare" measures that cover sectarian schools are permis-

[14] The court below concluded that any benefit to sectarian schools resulting from this program is merely a "collateral effect of the statute" (App. 66a).

sible, while "educational" measures are not. We suggest that such an attempt to attach different labels to state programs is not a meaningful approach to constitutional adjudication. Surely the State's concern with the quality of education its citizens receive is not different in source or substance from its concern with their health and safety or other aspects of their welfare. The philosophy that the State's only legitimate functions are to provide police and fire protection and maintain roads has long been discredited. Nor is there a practical distinction between "welfare" and "educational" aid. As noted in *Everson*, sectarian schools might well be unable to operate if they did not receive such ordinary governmental services as police and fire protection, sewage disposal, the maintenance of public highways and sidewalks, and school busing. 330 U.S. at 17–18.

A geographical distinction has also been suggested: aid which does not cross the property line of the sectarian school is permissible, while aid which crosses that line is not (Appellants' Brief, p. 22). This purported test is plainly inadequate since it would strike down the provision of unquestionably legitimate programs like school lunches and medical care, and would preclude police, fire and sanitation service on sectarian school property. The "property line" test is also unresponsive to the problems to which the First Amendment was addressed. Clearly aid to religion may result from governmental activity off, as well as on, church-owned premises. See, *e.g.*, *Torcaso* v. *Watkins*, *supra*. As this Court has said, what is important

is the purpose and effect of such aid, not where it takes place.

Of course, the Court need not in this case concern itself with the metes and bounds marking off the areas in which the government may perform services for religious institutions from those where it may not. Both in form and in fact, the New York program before the Court does not involve aid to sectarian schools in any proper usage of that concept. The statute merely provides for across-the-board loans of secular textbooks to any children in the designated grades who request them. The record shows that before this program was instituted it was the pupils in parochial schools (through their parents) who bore the expense of purchasing texts (App. 14a). It is therefore irrelevant to speculate about how the funding of secular textbooks might allow the sectarian school to divert its resources *pro tanto* into unmistakably religious functions. Apart from the point that the same objection would as a matter of logic forbid public financing of trash collection from parochial schools—which also "frees" their assets for other purposes—in this case it is the parents whose financial posture is affected. Thus, any nexus between the State's decision to save parents the cost of secular textbooks for their children and the "advance[ment of] religion" is so attenuated that it cannot be said that promoting religion is either "the" primary effect or "a" primary effect of this program (see Appellants' Brief, p. 26). See, also, McKinney's 1965 Session Laws, p. 2057.

Appellants also argue that the "child's request is a fiction" and that the whole program "is nothing but

a transparent attempt to do indirectly what cannot be done directly" (Brief, p. 19). Again, they apparently overlook the fact that the expenses saved are those of the parents, not of the school. They also assume the answer to questions not posed by this case: whether in any circumstances the State may bear the cost of supplementing or of supplanting the expenditures of a sectarian school. An even more basic objection is that their premise—that the child's request is a sham—is not supported by their own references. The Opinion of Counsel which they cite explicitly requires that each student must make a request for any books he wishes to use and must address it to the local board of education (Appellants' Brief, p. 9a). The school is given the option of either forwarding all individual requests collectively to the board of education *or* submitting a summary while it "keep[s] such requests on file * * *" (*ibid.*). Furthermore, appellants incorrectly suggest that the local board's duty to avoid duplicating existing supplies extends only to books owned by sectarian schools (Brief, p. 19); in fact the board is obliged to avoid purchasing books that are presently available in any public or non-public school (Brief, pp. 11a–12a). Accordingly, we perceive no basis for discrediting this program as not genuinely involving the neutral and even-handed administration of a measure designed to provide direct benefits to the children involved.

An apt analogy is the public library system, which the court below correctly viewed as a constitutionally relevant norm (App. 66a). No one suggests that allowing students from parochial schools to use public li-

braries contravenes the Establishment Clause. The New York textbook program is essentially indistinguishable from a lending library; it makes available to any individuals who so request secular books selected by a public agency. As the Court of Appeals pointed out, sectarian school teachers (like their counterparts in the public schools) frequently give assignments requiring the children to utilize public library books.[15] And surely sectarian school children (or teachers) borrowing public library books are not prohibited by the Constitution from bringing these books onto the school property, even if a religiously oriented commentary on the book will there be introduced. Of course, public library books are generally loaned for a briefer period than textbooks under the Textbook Law. But we fail to perceive why the latter program should for that reason be regarded as having as its "primary effect" the unconstitutional advancement of religion by the state.[16] Public library books, no less than the books loaned under the present statute, may be used on sectarian school property in connection with classes in which the teaching may be colored by a religious viewpoint. The only significant difference is that the textbook program is confined to books with

[15] Indeed, public libraries may relieve sectarian schools of the expense of maintaining their own libraries.

[16] Public libraries are, of course, open to all, while the Textbook Law authorizes loans only to children attending schools complying with the compulsory education law. However, this hardly has constitutional significance, since the statutory plan focuses on the education of school children, rather than on the general public enlightenment which is the concern of the public library system.

a secular content, while public libraries are not so confined—a distinction which hardly aids appellants' claim.

B. A CONSIDERATION OF THE ALTERNATIVES TO NEW YORK'S PROGRAM CONFIRMS THE CONCLUSION THAT THE STATE HAS MADE A REASONABLE AND CONSTITUTIONALLY PERMISSIBLE CHOICE

When the New York Legislature decided to extend textbook aid to private schools, it faced a dilemma. On the one hand, if sectarian school pupils were included, it faced the constitutional contentions raised in this suit. On the other hand, if these pupils were excluded, it faced the charge of discriminating against children on the basis of religion in the administration of a general aid program.

There are two basic alternatives to a program of the present kind. The Legislature might omit children attending sectarian schools from all of its general programs designed to improve the quality of elementary and secondary education in the State. Or it might seek some other means of improving the education of these children. There are certainly reasonable grounds for a legislative conclusion that these approaches represent less desirable means of improving the education of school children. Moreover, the alternatives would raise practical and legal problems of at least comparable magnitude.[17] A fact of educa-

[17] Once the State decides that it cannot ignore the education of sectarian school pupils, it may conclude that no alternatives to the textbook aid program will be as effective at a comparable cost. Any program for holding classes in secular subjects for sectarian school pupils on public school property after school hours or during vacations would doubtless involve attendance

tional life in our society is that significant proportions of students—numbering in the millions—are exercising what this Court in *Pierce* v. *Society of Sisters,* 268 U.S. 510, unanimously held is a constitutional right to attend a private, including a private sectarian, school. See *Griswold* v. *Connecticut,* 381 U.S. 479, 482. As the Court cautioned in *Everson,* a State may not exclude members of religious groups, *"because of their faith, or lack of it,* from receiving the benefits of public welfare legislation," lest efforts to avoid establishing religion "inadvertently prohibit [the State] from extending its general state law benefits to all its citizens without regard to their religious belief." 330 U.S. at 16. (Emphasis in original.) See, also, *McGowan* v. *Maryland,* 366 U.S. 420, 445; cf. *Thorpe* v. *Housing Authority,* 386 U.S.

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problems, and the time which could be devoted to these classes would necessarily be limited. Shared time or dual enrollment programs—under which sectarian school pupils spend part of their day enrolled in the local public school—are another possible alternative. See Pfeffer, *Church, State, and Freedom,* 571–579 (rev. ed. 1967). These programs, too, have been attacked as unconstitutional. Kurland, *Politics and the Constitution: Federal Aid to Parochial Schools,* 1 Land and Water L. Rev. 475, 494 (1966). Moreover, public schools may already be burdened to the point where they could not accommodate the additional pupils, even for a part-time attendance; and to provide the additional teachers and building space necessary to accommodate an influx of part-time students from sectarian schools would undoubtedly be considerably more expensive than the provision of textbooks.

In short, a program which reaches the child in the school at which he spends most of his day may surely be regarded as the most effective and efficient way to improve the quality of his secular education.

670, 678–679 (Douglas, J., concurring).[18] Of course, the Court in *Everson* pointed out that the State might limit bus transportation to students in the Sate's schools; nonetheless, the caveat illustrates that when the determinations in this area are affected by competing First Amendment considerations, the legislature's exercise of its peculiar capacity to consider and weigh a whole panoply of factors should be respected in the absence of a clear violation of its duty of neutrality. Viewed in the light of the alternatives available to the legislature, the New York textbook law is a reasonably tailored, carefully balanced, and neutral program wholly compatible with the objectives of the First Amendment.

The practical consequences of excluding sectarian school children from all government programs of aid to education are obvious. Given such a policy of exclusion, many parents might prove unwilling or unable to maintain their children in parochial or sectarian schools. This, in turn, would shift new and heavy burdens to the State. It has been estimated that non-

[18] In *Zorach* v. *Clauson*, 343 U.S. 306, 312–314, in sustaining the validity of released-time programs, the Court explained: "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. * * * [W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the scope of religious influence." The New York program before the Court in this case falls short even of the "encouragement" which *Zorach* recognized might in some situations be permissible, since the Textbook Loan law merely allows children attending parochial schools to maintain a parity with their peers in public schools.

public schools in New York City alone save the taxpayers almost $500 million annually. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part II. The Nonestablishment Principle,* 81 Harv. L. Rev. 513, 573 n. 176.

Also circumscribing any legislative decision in this area are the substantial constitutional problems that would have to be faced if sectarian school pupils were to be excluded from all programs of government aid to education. Parents have a constitutional right to choose to send their children to sectarian rather than public schools. *Pierce* v. *Society of Sisters,* 268 U.S. 510, 535. For many parents, this course is a matter of religious obligation,[19] as fully entitled to First Amendment protection as the religious obligations accorded protection in *Murdock* v. *Pennsylvania,* 319 U.S. 105, and *Sherbert* v. *Verner,* 374 U.S. 398. And although we recognize that the State is not required to subsidize the exercise of First Amendment rights, neither may it, absent some compelling reason, disqualify a person from receipt of generally available benefits because of his performance of a religious obligation. *Sherbert* v. *Verner, supra; Everson* v. *Board of Education, supra,* 330 U.S. at 16. Surely the Legislature may validly conclude that it will not discourage the exercise of a First Amendment right by excluding students who are sent to sectarian schools from access

[19] *Everson* v. *Board of Education,* 330 U.S. 1, 22–23 (Jackson, J., dissenting); Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part II. The Nonestablishment Principle,* 81 Harv. L. Rev. 513, 573 n. 178.

to the same books available to all other public and private school pupils.

If a state policy of exclusion of children in sectarian schools from government aid programs were to induce children who would prefer a sectarian education to attend public schools instead, problems of Church-State friction might well increase. The churches which have felt strongly enough about their role in education to maintain a sectarian school system are not likely to lose this concern merely because their adherents attend public schools in larger numbers. Instead, these churches might direct more of their energies to influencing the curriculum in the public schools. See *Epperson* v. *State*, 242 Ark. 922, 416 S.W. 2d 322 (1967), probable jurisdiction noted, No. 749, this Term, March 4, 1968; *Giannella, op. cit. supra*, 81 Harv. L. Rev. at 567. Surely, legislators might reasonably conclude that the problems of Church-State friction and of religious divisiveness in the community would be aggravated rather than diminished by excluding children in sectarian schools from aid programs open to other children.

There are, of course, constitutional limits on the Legislature's range of choice. The problem of accommodating the interests involved is a delicate one. We emphasize, as we did at the outset, that this is a case which falls well within the limits. We stress again that the textbooks loaned are non-sectarian; that any benefit redounds to the advantage of individual parents and students; that sectarian students merely participate in a neutral program for all students; and that there is no basis for suggesting that the loan of secular

textbooks has converted sectarian schools into quasi-public institutions, identifying the state with sectarian doctrines. What other types of aid-to-education might transgress constitutional limits is not, of course, a question that must be decided in this case.

III. NO QUESTION OF VIOLATION OF THE FREE EXERCISE CLAUSE IS RAISED BY THIS CASE

Although appellants persist in their contention that the New York textbook loan program violates the Free Exercise Clause of the First Amendment, we submit that this attempt to inject an alternative constitutional challenge is groundless. See *Zorach* v. *Clauson*, 343 U.S. 306, 311. A claim that the Free Exercise Clause has been violated depends upon a showing of direct governmental pressure, *Engel* v. *Vitale*, 370 U.S. 421, 430, which coerces a person to believe or disbelieve in a particular religion or in religion in general, *Torcaso* v. *Watkins*, 367 U.S. 488, 495. As the Court explained in *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 223, "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. * * * [A] violation of the Free Exercise Clause is predicated on coercion * * *." Appellants' only explanation of their Free Exercise Clause claim (Brief, pp. 31–37) is confined to a reiteration of their arguments made in connection with their charge of Establishment.[20] It

[20] The contention that the New York statute "promotes a union of Church and State" (Brief, p. 36) is the classic formulation of an Establishment claim, and poses no separate Free Exercise question.

is evident that no one is being coerced in the practice of his faith by the textbook loan program. To the extent that they argue that the recipients of aid are in danger of being restricted in their religious liberty by political controls which follow public assistance (Brief, p. 35), appellants fail to explain how any student or parent is compelled to make an "individual request" for a textbook loan, or why no recipients of loaned textbooks, or members of the class who may seek such loans, have joined the attack upon the program.

Appellants, moreover, would lack the standing necessary to assert even a colorable Free Exercise claim. They are two local boards of education, and there could be no assertion that these boards or their members, acting in their official capacity, have any right to free exercise of religion which is violated by the Textbook Law. As members, the individuals' sole interest in this textbook program is that they, as public officials, must administer it. The fact that they are obliged to expend public moneys in ways which they consider to be unconstitutional does not constitute a violation of their right to practice or not to practice religion.

Appellants argue, however, that insofar as the Textbook Law forces taxpayers to contribute to an establishment of religion to which they do not subscribe, it thereby violates the Free Exercise Clause. Apart from the fact that this argument is merely a reiteration of the Establishment contention, appellants themselves do not sue as taxpayers, and they have no standing to assert the "Free Exercise" rights of

others. *McGowan* v. *Maryland*, 366 U.S. 420, 429–430. There is no suggestion of any weighty countervailing considerations that might justify an exception permitting appellants to raise the constitutional rights of others; nor is it contended that any individuals who feel their religious freedom is endangered will be unable to protect their rights for themselves.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals of New York should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
EDWIN L. WEISL, JR.,
Assistant Attorney General.
LAWRENCE G. WALLACE,
PHILIP A. LACOVARA,
Assistants to the Solicitor General.
ALAN S. ROSENTHAL,
ROBERT V. ZENER,
Attorneys.

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SUPREME COURT OF THE UNITED STATES

No. 660.—October Term, 1967.

Board of Education of Central School District No. 1, etc., et al., Appellants, *v.* James E. Allen, Jr., as Commissioner of Education of New York, et al.	On Appeal From the Court of Appeals of New York.

[June 10, 1968.]

Mr. Justice White delivered the opinion of the Court.

A law of the State of New York requires local public school authorities to lend textbooks free of charge to all students in grades seven through 12; students attending private schools are included. This case presents the question whether this statute is a "law respecting the establishment of religion or prohibiting the free exercise thereof," and so in conflict with the First and Fourteenth Amendments to the Constitution, because it authorizes the loan of textbooks to students attending parochial schools. We hold that the law is not in violation of the Constitution.

Until 1965, § 701 of the Educational Law of the State of New York authorized public school boards to designate textbooks for use in the public schools, to purchase such books with public funds, and to rent or sell the books to public school students.[1] In 1965 the Legislature

[1] New York Sess. Laws 1950, c. 239, § 1. New York Education Law § 703, New York Sess. Laws 1950, c. 239, § 3, permitted the qualified voters of any school district to authorize a special tax for the purpose of making available free textbooks. The 1965 amendments that required free textbooks to be provided for grades seven through 12 amended § 703 so that it now permits local voters to approve free books for grades one through six.

amended § 701, basing the amendments on findings that the "public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state." [2] Beginning with the 1966–1967 school year, local school boards were required to purchase textbooks and lend them without charge "to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law." The books now loaned are "text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education," and which—according to a 1966 amendment—"a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends." [3]

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[2] New York Sess. Laws 1965, c. 320, § 1.

[3] New York Education Law § 701 (1967 Supp.):

"1. In the several cities and school districts of the state, boards of education, trustees or such body or officer as perform the functions of such boards, shall designate text-books to be used in the schools under their charge.

"2. A text-book, for the purposes of this section shall mean a book which a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends.

"3. In the several cities and school districts of the state, board of education, trustees or such body or officers as perform the function of such boards shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities. Such text-books are to be loaned free to such children subject to such rules and regulations as are or

Appellants, the members of the Board of Education of Central School District No. 1 in Rensselaer and Columbia Counties, brought suit in the New York courts against appellee James Allen.[4] The complaint alleged that § 701 violated both the State and Federal Constitutions; that if appellants, in reliance on their interpretation of the Constitution, failed to lend books to parochial school students within their counties appellee Allen would remove appellants from office; and that to prevent this, appellants were complying with the law and submitting to their constituents a school budget including funds for books to be lent to parochial school pupils. Appellants therefore sought a declaration that § 701 was invalid, an order barring appellee Allen from removing appellants from office for failing to comply with it, and another order restraining him from apportioning state funds to school districts for the purchase of textbooks to be lent to parochial students. After answer, and upon cross-motions for summary judgment, the trial court held the law unconstitutional under the First and Fourteenth Amendments and entered judgment for appellants. 51 Misc. 2d 297, 273 N. Y. S. 2d 239 (1966). The Appellate Division reversed, ordering the complaint dismissed on the ground that appellant school boards had no standing to attack the validity of a state statute. 27 A. D. 2d 69, 276

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may be prescribed by the board of regents and such boards of education, trustees or other school authorities."

The present subdivision (2) was added by amendment in 1966, New York Sess. Laws 1966, c. 795. This suit was filed, and the trial court opinion was rendered, prior to the 1966 amendment.

[4] Intervention was permitted on plaintiffs' side by the Board of Education of Union Free School District No. 3 in Nassau County, which appears here as co-appellant, and on defendants' side by parents of certain students attending private schools, who appear here as co-appellees.

N. Y. S. 2d 234 (1966). On appeal, the New York Court of Appeals concluded by a 4–3 vote that appellants did have standing [5] but by a different 4–3 vote held that § 701 was not in violation of either the State or the Federal Constitution. 20 N. Y. 2d 109, 228 N. E. 2d 791, 281 N. Y. S. 2d 799 (1967). The Court of Appeals said that the law's purpose was to benefit all school children, regardless of the type of school they attended, and that only textbooks approved by public school authorities could be loaned. It therefore considered § 701 "completely neutral with respect to religion, merely making available secular textbooks at the request of the individual student and asking no question about what school he attends." Section 701, the Court of Appeals concluded, is not a law which "establishes a religion or constitutes the use of public funds to aid religious schools." 20 N. Y. 2d, at 117; 228 N. E. 2d, at 794, 795; 281 N. Y. S. 2d, at 805. We noted probable jurisdiction. 389 U. S. 1031 (1968).

Everson v. *Board of Education*, 330 U. S. 1 (1947), is the case decided by this Court that is most nearly in point for today's problem. New Jersey reimbursed parents for expenses incurred in busing their children to parochial schools. The Court stated that the Establishment Clause bars a State from passing "laws which aid one religion, aid all religions, or prefer one religion over another," and bars too any "tax in any amount, large or small . . . levied to support any religious activities

[5] Appellees do not challenge the standing of appellants to press their claim in this Court. Appellants have taken an oath to support the United States Constitution. Believing § 701 to be unconstitutional, they are in the position of having to choose between violating their oath and taking a step—refusal to comply with § 701—that would be likely to bring their expulsion from office and also a reduction in state funds for their school districts. There can be no doubt that appellants thus have a "personal stake in the outcome" of this litigation. *Baker* v. *Carr*, 369 U. S. 186, 204 (1962).

or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." 330 U. S., at 15–16. Nevertheless, said the Court, the Establishment Clause does not prevent a State from extending the benefits of state laws to all citizens without regard for their religious affiliation and does not prohibit "New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as part of a general program under which it pays the fares of pupils attending public and other schools." The statute was held to be valid even though one of its results was that "children are helped to get to church schools" and "some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets." 330 U. S., at 17. As with public provision of police and fire protection, sewage facilities, and streets and sidewalks, payment of bus fares was of some value to the religious school, but was nevertheless not such support of a religious institution as to be a prohibited establishment of religion within the meaning of the First Amendment.

Everson and later cases have shown that the line between state neutrality to religion and state support of religion is not easy to locate. "The constitutional standard is the separation of Church and State. The problem, like many problems in constitutional law, is one of degree." *Zorach* v. *Clauson*, 343 U. S. 306, 314 (1952). See *McGowan* v. *Maryland*, 366 U. S. 420 (1961). Based on *Everson*, *Zorach*, *McGowan*, and other cases, *Abington School District* v. *Schempp*, 374 U. S. 203 (1963), fashioned a test ascribed to by eight Justices for distinguishing between forbidden involvements of the State with religion and those contacts which the Establishment Clause permits:

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment?

> If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. *Everson* v. *Board of Education.*" 374 U. S., at 222.

This test is not easy to apply, but the citation of *Everson* by the *Schempp* Court to support its general standard made clear how the *Schempp* rule would be applied to the facts of *Everson.* The statute upheld in *Everson* would be considered a law having "a secular legislative purpose and a primary effect that neither advances nor inhibits religion." We reach the same result with respect to the New York law requiring school books to be loaned free of charge to all students in specified grades. The express purpose of § 701 was stated by the New York Legislature to be furtherance of the educational opportunities available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose. The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools.[6] Perhaps free books

[6] While the record and the state court opinions in this case contained no information about how the books are in fact transferred from the Boards of Education to individual students, both parties suggested in their briefs and on oral argument before this Court that New York permits private schools to submit to boards of education summaries of the requests for textbooks filed by individual students, and also permits private schools to store on their premises the textbooks being loaned by the Board of Education to the students. This interpretation of the State's administrative procedure is supported by an "Opinion of Counsel" made available

make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution.

Of course books are different from buses. Most bus rides have no inherent religious significance, while religious books are common. However, the language of § 701 does not authorize the loan of religious books, and the State claims no right to distribute religious literature. Although the books loaned are those required by the parochial school for use in specific courses, each book loaned must be approved by the public school authorities; only secular books may receive approval. The law was construed by the Court of Appeals of New York as "merely making available secular textbooks at the request of the individual student," *supra*, and the record contains no suggestion that religious books have been loaned. Absent evidence we cannot assume that school authorities, who constantly face the same problem in selecting textbooks for use in the public schools, are unable to distinguish between secular and religious books or that they will not honestly discharge their duties under the law.

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by the Board of Regents and the State Department of Education to local school superintendents. For purposes of this case we consider the New York statute to permit these procedures. So construing the statute, we find it in conformity with the Constitution, for the books are furnished for the use of individual students and at their request.

It should be noted that the record contains no evidence that any of the private schools in appellants' districts previously provided textbooks for their students. There is some evidence that at least some of the schools did not: intervenor defendants asserted that they had previously purchased all their children's textbooks. And see statement of then Commissioner of Education Keppel: "Nonpublic schools rarely provide free textbooks." 1 Hearings on Elementary and Secondary Education Act of 1965 before General Subcommittee on Education of House Committee on Education and Labor 93 (1965).

In judging the validity of the statute on this record we must proceed on the assumption that books loaned to students are books that are not unsuitable for use in the public schools because of religious content.

The major reason offered by appellants for distinguishing free textbooks from free bus fares is that books, but not buses, are critieal to the teaching process, and in a sectarian school that process is employed to teach religion. However this Court has long recognized that religious schools pursue two goals, religious instruction and secular education. In the leading case of *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925), the Court held that although it would not question Oregon's power to compel school attendance or require that the attendance be at an institution meeting State-imposed requirements as to quality and nature of curriculum, Oregon had not shown that its interest in secular education required that all children attend publicly operated schools. A premise of this holding was the view that the State's interest in education would be served sufficiently by reliance on the secular teaching that accompanied religious training in the schools maintained by the Society of Sisters. Since *Pierce,* a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction.[7] Indeed, the

[7] This Court has twice suggested the constitutionality of these state regulations. "[T]he State may 'require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty, which tend to inspire patriotism and love of country.'" *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 631 (1943), quoting *Minersville School District* v. *Gobitis,* 310 U. S. 586, 604 (1940) (Stone, J., dissenting). "This Court has said that

State's interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes.[8] These cases were a sensible corollary of *Pierce* v. *Society of Sisters:* if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function. Another corollary was *Cochran* v. *Louisiana State Board of Education,* 281 U. S. 370 (1930), where appellants said that a statute requiring school

parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has the power to impose." *Everson* v. *Board of Education,* 330 U. S. 1, 18 (1947) (citing *Pierce* v. *Society of Sisters*). A great many state cases have upheld a wide range of private school regulation. *E. g., Meyerkorth* v. *State,* 173 Neb. 889, 115 N. W. 2d 585 (1962), appeal dismissed for want of a substantial federal question, 372 U. S. 705 (1963); *State* v. *Hoyt,* 84 N. H. 38, 146 A. 170 (1929); *People* v. *Donner,* 199, Misc., 643, 99 N. Y. S. 2d 830 (Dom. Rel. Ct. 1950), aff'd mem., 278 App. Div. 705, 103 N. Y. S. 2d 757, aff'd mem., 302 N. Y. 857, 100 N. E. 2d 48, appeal dismissed for want of a substantial federal question, 342 U. S. 884 (1951).

New York State regulates private schools extensively, especially as to attendance and curriculum. New York Education Law §§ 3201–3229 (1953). Regents examinations are given to private school students. *Id.,* § 209. The basic requirement is that the instruction given in private schools satisfying the compulsory attendance law be "at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides." *Id.,* § 3204 (2).

New York requires school attendance of "each minor from seven to sixteen years of age" unless he has completed high school. *Id.,* § 3205.

[8] *E. g., People* v. *Turner,* 121 Cal. App. 2d 861, 263 P. 2d 685 (1953), appeal dismissed for want of a substantial federal question, 347 U. S. 972 (1954).

books to be furnished without charge to all students, whether they attended public or private schools, did not serve a "public purpose," and so offended the Fourteenth Amendment. Speaking through Chief Justice Hughes, the Court summarized as follows its conclusion that Louisiana's interest in the secular education being provided by private schools made provision of textbooks to students in those schools a properly public concern: "[The State's] interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded." 281 U. S., at 375.

Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students.[9] This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education.

[9] In 1966 in New York State, almost 900,000 students, or 21.5% of total state enrollment, attended nonpublic schools. University of State of New York, Education Statistics New York State, Table I (1968). The comparable statistic for the Nation was at least 10%. United States Bureau of the Census, Statistical Abstract of the United States: 1967, at 111 (1967).

Against this background of judgment and experience, unchallenged in the meager record before us in this case, we cannot agree with appellants either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion. This case comes to us after summary judgment entered on the pleadings. Nothing in this record supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history, or literature, are used by the parochial schools to teach religion. No evidence has been offered about particular schools, particular courses, particular teachers, or particular books. We are unable to hold, based solely on judicial notice, that this statute results in unconstitutional involvement of the State with religious instruction or that § 701, for this or the other reasons urged, is a law respecting the establishment of religion within the meaning of the First Amendment.

Appellants also contend that § 701 offends the Free Exercise Clause of the First Amendment. However, "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion," *Abington School District* v. *Schempp,* 374 U. S. 203, 223 (1963), and appellants have not contended that the New York law in any way coerces them as individuals in the practice of their religion.

The judgment is affirmed.

SUPREME COURT OF THE UNITED STATES

No. 660.—October Term, 1967.

Board of Education of Central School District No. 1, etc., et al., Appellants, *v.* James E. Allen, Jr., as Commissioner of Education of New York, et al.	On Appeal From the Court of Appeals of New York.

[June 10, 1968.]

Mr. Justice Harlan, concurring.

Although I join the opinion and judgment of the Court, I wish to emphasize certain of the principles which I believe to be central to the determination of this case, and which I think are implicit in the Court's decision.

The attitude of government toward religion must, as this Court has frequently observed, be one of neutrality. Neutrality is, however, a coat of many colors. It requires that "government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief." *Abington School Dist.* v. *Schempp*, 374 U. S. 203, 305 (concurring opinion of Goldberg, J.). Realization of these objectives entails "no simple and clear measure," *id.*, at 306, by which this or any case may readily be decided, but these objectives do suggest the principles which I believe to be applicable in the present circumstances. I would hold that where the contested governmental activity is calculated to achieve nonreligious purposes otherwise within the competence of the State, and where the activity does not involve the State "so significantly and directly in the realm of the sectarian as to give rise to . . . divisive

influences and inhibitions of freedom," *id.*, at 307, it is not forbidden by the religious clauses of the First Amendment.

In my opinion, § 701 of the Education Law of New York does not employ religion as its standard for action or inaction, and is not otherwise inconsistent with these principles.

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[June 10, 1968.]

Mr. Justice Black, dissenting.

The Court here affirms a judgment of the New York Court of Appeals which sustained the constitutionality of a New York law providing state tax-raised funds to supply school books for use by pupils in schools owned and operated by religious sects. I believe the New York law held valid is a flat, flagrant, open violation of the First and Fourteenth Amendments which together forbid Congress or state legislatures to enact any law "respecting an establishment of religion." For that reason I would reverse the New York Court of Appeals' judgment. This, I am confident, would be in keeping with the deliberate statement we made in *Everson* v. *Board of Education*, 330 U. S. 1, 15–16 (1947), and repeated in *McCollum* v. *Board of Education*, 333 U. S. 203, 210–211 (1948), that:

> "Neither a State nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or dis-

> beliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a State nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"

The *Everson* and *McCollum* cases plainly interpret the First and Fourteenth Amendments as protecting the taxpayers of a State from being compelled to pay taxes to their government to support the agencies of private religious organizations the taxpayers oppose. To authorize a State to tax its residents for such church purposes is to put the State squarely in the religious activities of certain religious groups that happen to be strong enough politically to write their own religious preferences and prejudices into the laws. This links state and churches together in controlling the lives and destinies of our citizenship—a citizenship composed of people of myriad religious faiths, some of them bitterly hostile to and completely intolerant of the others. It was to escape laws precisely like this that a large part of the Nation's early immigrants fled to this country. It was also to escape such laws and such consequences that the First Amendment was written in language strong and clear barring passage of any law "respecting establishment of religion."

It is true, of course, that the New York law does not as yet formally adopt or establish a state religion. But it takes a great stride in that direction and coming events cast their shadows before them. The same powerful sectarian religious propogandists who have succeeded

in securing passage of the present law to help religious schools carry on their sectarian religious purposes can and doubtless will continue their propoganda, looking toward complete domination and supremacy of their particular brand of religion.[1] And it nearly always is by insidious approaches that the citadels of liberty are most successfully attacked.[2]

I know of no prior opinion of this Court upon which the majority here can rightfully rely to support its holding this New York law constitutional. In saying this, I am not unmindful of the fact that the New York Court of Appeals purported to follow *Everson* v. *Board of Education, supra,* in which this Court, in an opinion written by me, upheld a New Jersey law authorizing reimbursement to parents for the transportation of children attending sectarian schools. That law did not attempt to deny the benefit of its general terms to children of any faith going to any legally authorized school. Thus, it was treated in the same way as a general law paying the streetcar fare *of all school children,* or a law providing midday lunches for all children or all school children, or a law to provide police protection for children going to and from school, or general laws to provide police and fire protection for buildings, including, of course, churches and church school buildings as well as others.

As my Brother DOUGLAS so forcefully shows, in an argument with which I fully agree, upholding a State's power to pay bus or streetcar fares for school children cannot provide support for the validity of a state law using tax-raised funds to buy school books for a religious school. The First Amendment's bar to establishment of religion must preclude a State from using funds levied from all of its citizens to purchase books for use by

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[1] See dissenting opinion of MR. JUSTICE DOUGLAS.

[2] See *Boyd* v. *United States,* 116 U. S. 616.

sectarian schools, which, although "secular," realistically will in some way inevitably tend to propagate the religious views of the favored sect. Books are the most essential tool of education since they contain the resources of knowledge which the educational process is designed to exploit. In this sense it is not difficult to distinguish books, which are the heart of any school, from bus fares, which provide a convenient and helpful general public transportation service. With respect to the former, state financial support actively and directly assists the teaching and propagation of sectarian religious viewpoints in clear conflict with the First Amendment's establishment bar; with respect to the latter, the State merely provides a general and nondiscriminatory transportation service in no way related to substantive religious views and beliefs.

This New York law, it may be said by some, makes but a small inroad and does not amount to complete state establishment of religion. But that is no excuse for upholding it. It requires no prophet to foresee that on the argument used to support this law others could be upheld providing for state or federal government funds to buy property on which to erect religious school buildings or to erect the buildings themselves, to pay the salaries of the religious school teachers, and finally to have the sectarian religious groups cease to rely on voluntary contributions of members of their sects while waiting for the Government to pick up all the bills for the religious schools. Arguments made in favor of this New York law point squarely in this direction, namely, that the fact that government has not heretofore aided religious schools with tax-raised funds amounts to a discrimination against those schools and against religion. And that there are already efforts to have government supply the money to erect buildings for sectarian religious schools is shown by a recent Act of Congress which

apparently allows for precisely that. See Higher Education Facilities Act, 20 U. S. C. § 701 *et seq.*

I still subscribe to the belief that tax-raised funds cannot constitutionally be used to support religious schools, buy their school books, erect their buildings, pay their teachers, or pay any other of their maintenance expenses, even to the extent of one penny. The First Amendment's prohibition against governmental establishment of religion was written on the assumption that state aid to religion and religious schools generates discord, disharmony, hatred, and strife among our people, and that any government that supplies such aids is to that extent a tyranny. And I still believe that the only way to protect minority religious groups from majority groups in this country is to keep the wall of separation between church and state high and impregnable as the First and Fourteenth Amendments provide. The Court's affirmance here bodes nothing but evil to religious peace in this country.

SUPREME COURT OF THE UNITED STATES

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[June 10, 1968.]

Mr. Justice Douglas, dissenting.

We have for review a statute which authorizes New York State to supply textbooks to students in parochial as well as in public schools. The New York Court of Appeals sustained the law on the grounds that it involves only "secular textbooks" and that that type of aid falls within *Everson* v. *Board of Education*, 330 U. S. 1,[1] where a divided Court upheld a state law which made bus service available to students in parochial schools as well as to students in public schools. 20 N. Y. 2d 109, 281 N. Y. S. 2d 799, 228 N. E. 2d 791.

The statute on its face empowers each parochial school to determine for itself which textbooks will be eligible for loans to its students, for the Act provides that the only text which the State may provide is "a book which a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends." N. Y. Educ. Law § 701 (2). This initial and crucial

[1] *Everson*, relied on by the Court of Appeals of New York, did not involve textbooks and did not present the serious problems raised by a form of aid to parochial students which injects religious issues into the choice of curriculum. In the only decision of this Court upholding a state grant of textbooks to sectarian school students, *Cochran* v. *Board of Education*, 281 U. S. 370, the First Amendment issue was not raised. See pp. 370–373; *Everson* v. *Board of Education*, 330 U. S. 1, 29, n. 3 (dissenting opinion).

selection is undoubtedly made by the parochial school's principal or its individual instructors, who are, in the case of Roman Catholic schools, normally priests or nuns.

The next step under the Act is an "individual request" for an eligible textbook (§ 701 (3)), but the State Education Department has ruled that a pupil may make his request to the local public board of education through a "private school official." [2] Local boards have accordingly provided for those requests to be made by the individual or "by groups or classes." [3] And forms for textbook requisitions to be filled out by the head of the private school are provided.[4]

The role of the local public school board is to decide whether to veto the selection made by the parochial school. This is done by determining first whether the text has been or should be "approved" for use in public schools and second whether the text is "secular," "nonreligious," or "non-sectarian." [5] The local boards ap-

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[2] State Education Department, letter to school superintendents and principals dated January 10, 1966, by Herbert F. Johnson, ¶ 5.

[3] Manual of Instruction on Recordkeeping Procedures for Textbooks Loaned in Conformance With Provisions of the New York State Textbook Law, ¶ 2.3 (1967).

[4] See Appendix A to this opinion.

[5] The State Court of Appeals used the phrases "secular textbooks" and "nonreligious textbooks" without any elaboration as to what was meant. 20 N. Y. 2d, at 109; 281 N. Y. S. 2d, at 805; 228 N. E. 2d, at 794–795. The legislature, in its "statement of policy" to the Act (Laws of 1965, c. 320, § 1) speaks of aiding instruction in "non-sectarian subjects," and gives as examples "science, mathematics, [and] foreign languages." The State Department of Education has stated that "it is necessary that . . . [t]he textbooks be non-sectarian (this eliminates denominational editions and those carrying the 'imprimatur' or 'nihil obstat' of a religious authority) . . . ." Opinion of Counsel No. 181. There are no other definitions to be found.

The Court was advised at oral argument by the Assistant Attorney General that Opinion of Counsel No. 181 is advisory only and not binding. It would state the policy of the New York Depart-

parently have broad discretion in exercising this veto power.[6]

Thus the statutory system provides that the parochial school will ask for the books that it wants. Can there be the slightest doubt that the head of the parochial school will select the book or books that best promote its sectarian creed?

If the board of education supinely submits by approving and supplying the sectarian or sectarian-oriented textbooks, the struggle to keep church and state separate has been lost. If the board resists, then the battleline between church and state will have been drawn and the contest will be on to keep the school board independent or to put it under church domination and control.

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ment of Education in event of an appeal to it by a taxpayer of a local board's decision that a certain text was "non-sectarian" or should be "approved." The Regents of the State University, who have the last word on such matters and are specifically authorized by § 701 (3) to promulgate regulations respecting the textbook loan program, have not done so, and their position on what is "non-sectarian" is unknown.

[6] For example the regulations of the Board of Education of the City of New York respecting approval of textbooks for public schools contain no limitations directly relevant to the question of sectarianism. The material is to "promote the objectives of the educational program," "treat the subject competently and accurately," "be in good taste," "have a wholesome tone that is consonant with right conduct and civic values," "be in harmony with American democratic ideals and moral values," "be free of any reflection on the dignity and status of any group, race, or religion, whether expressed or implied, by statement or omission," and "be free of objectionable features of over-dramatization, violence, or crime." Guiding Principles for Schools in the Selection and Use of "Non-Listed" Instructional Materials (1952). Opinion of Counsel No. 181 (see n. 5, *supra*) simply states that the local board, if it finds that no other board has approved the text in question, should "decide if it wishes to approve the same itself." This opinion of counsel also states that if the board is in doubt as to whether a text is "non-sectarian," that is whether it carries an imprimatur or nihil obstat or is a denominational edition, it "must make the appropriate determination."

Whatever may be said of *Everson*, there is nothing ideological about a bus. There is nothing ideological about a school lunch, nor a public nurse, nor a scholarship. The constitutionality of such public aid to students in parochial schools turns on considerations not present in this textbook case. The textbook goes to the very heart of education in a parochial school. It is the chief, although not solitary, instrumentality for propagating a particular religious creed or faith. How can we possibly approve such state aid to a religion? A parochial school textbook may contain many, many more seeds of creed and dogma than a prayer. Yet we struck down in *Engel v. Vitale*, 370 U. S. 421, an official New York prayer for its public schools, even though it was not plainly denominational. For we emphasized the violence done the Establishment Clause when the power was given religious-political groups "to write their own prayers into law." *Id.*, at 427. That risk is compounded here by giving parochial schools the initiative in selecting the textbooks they desire to be furnished at public expense.

Judge Van Voorhis, joined by Chief Judge Fuld and Judge Breitel, dissenting below, said that the difficulty with the textbook loan program "is that there is no reliable standard by which secular and religious textbooks can be distinguished from each other." 20 N. Y. 2d, at 122; 281 N. Y. S. 2d, at 809; 228 N. E. 2d, at 798. The New York Legislature felt that science was a nonsectarian subject (see n. 5, *supra*). Does this mean that any general science textbook intended for use in grades 7–12 may be provided by the State to parochial school students? May John M. Scott's Adventures in Science (1963) be supplied under the textbook loan program? This book teaches embryology in the following manner:

> "To you an animal usually means a mammal, such as a cat, dog, squirrel, or guinea pig. The new

animal or embryo develops inside the body of the mother until birth. The fertilized egg becomes an embryo or developing animal. Many cell divisions take place. In time some cells become muscle cells, others nerve cells or blood cells, and organs such as eyes, stomach, and intestines are formed.

"The body of a human being grows in the same way, but it is much more remarkable than that of any animal, for the embryo has a human soul infused into the body by God. Human parents are partners with God in creation. They have very great powers and great responsibilities, for through their cooperation with God souls are born for heaven." (Pp. 618–619.)[7]

Comparative economics would seem to be a nonsectarian subject. Will New York, then, provide Arthur J. Hughes' general history text, Man in Time (1964), to parochial school students? It treats that topic in this manner:

"Capitalism is an economic system based on man's right to private property and on his freedom to use that property in producing goods which will earn him a just profit on his investment. Man's right to private property stems from the Natural Law implanted in him by God. It is as much a part of man's nature as the will to self-preservation." (P. 560.)

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[7] Although the author of this textbook is a priest, the text contains no imprimatur and no nihil obstat. Although published by a Catholic press, the Loyola University Press, Chicago, it is not marked in any manner as a "denominational edition," but is simply the general edition of the book. Accordingly, under Opinion of Counsel No. 181, the only document approaching a "regulation" on the issue involved here, Adventures in Science would qualify as "non-sectarian." See nn. 5, 6, *supra*.

"The broadest definition of socialism is government ownership of all the means of production and distribution in a country. . . . Many, but by no means all, Socialists in the nineteenth century believed that crime and vice existed because poverty existed, and if poverty were eliminated, then crime and vice would disappear. While it is true that poor surroundings are usually unhealthy climates for high moral training, still, man has the free will to check himself. Many Socialists, however, denied free will and said that man was a creation of his environment. . . . If Socialists do not deny Christ's message, they often ignore it. Christ showed us by His life that this earth is a testing ground to prepare man for eternal happiness. Man's interests should be in this direction at least part of the time and not always directed toward a futile quest for material goods." (Pp. 561–564.)[8]

Mr. Justice Jackson said, ". . . I should suppose it is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind." *McCollum* v. *Board of Education*, 333 U. S. 203, 236 (concurring opinion). Yet, as he inquired, what emphasis should one give who teaches the Reformation, the Inquisition, or the early effort in New England to establish "'a Church without a Bishop and a State without a King?'" *Ibid.* What books should be chosen for those subjects?

Even where the treatment given to a particular topic in a school textbook is not blatantly sectarian, it will

[8] Man In Time contains a nihil obstat and an imprimatur. Thus, if Opinion of Counsel No. 181 (nn. 5, 6, *supra*) is applicable, this book may not be provided by the State. The Opinion of Counsel, however, is only "advisory," we are told; moreover, the religious endorsements could easily be removed by the author and publisher at the next printing.

necessarily have certain shadings that will lead a parochial school to prefer one text over another.[9]

The Crusades, for example, may be taught as a Christian undertaking to "save the Holy Land" from the Moslem Turks who "became a threat to Christianity and its holy places," which "they did not treat . . . with respect" (Wilson, Wilson, Erb and Clucas, Out of the Past 284 (1954)), or as essentially a series of wars born out of political and materialistic motives (see Leinwand, The Pageant of World History 136–137 (1965).

Is the dawn of man to be explained in the words, "God created man and made man master of the earth" (Furlong, The Old World and America 5 (1937)), or in the language of evolution (see Wallbank, Man's Story 32–35 (1961))?

Is the slaughter of the Aztecs by Cortes and his entourage to be lamented for its destruction of a New World

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[9] Some parochial schools may prefer those texts which are liberally sprinkled with religious vignettes. This creeping sectarianism avoids the direct teaching of religious doctrine but keeps the student continually reminded of the sectarian orientation of his education. In Furlong, Margaret, and Sharkey's American history text, America Yesterday (1963), for example, the student is informed that the first mass to be said in what is now the United States was in 1526 near Chesapeake Bay, that eight French missionaries to Canada in the early 1600's were canonized in 1930, that one of the men who signed the Declaration of Independence and two who attended the Constitutional Convention were Catholic, and that the superintendent of the Hudson Bay Company's outpost in the Oregon country converted to Catholicism in 1842. Pp. 26, 73–74, 102, 140, 235. And Scott's Adventures in Science (1963), in teaching the atmospheric conditions prevailing at the top of Mount Everest, informs the student that when Sir Edmund Hillary first scaled this peak he placed there a "tiny crucifix" which a Benedictine monk had supplied. P. 72.

America Yesterday, *supra*, is another example of a text written by the clergy (here a priest and nun together with one layman) that contains no imprimatur and no nihil obstat and is not a denominational edition. See nn. 5–7.

culture (see Caughey, Franklin, & May, Land of the Free 27028 (1965)), or forgiven because the Spaniards "carried the true Faith" to a barbaric people who practiced human sacrifice (see Furlong, Margaret, & Sharkey, America Yesterday 17, 34 (1963))?

Is Franco's revolution in Spain to be taught as a crusade against anti-Catholic forces (see Hoffman, Vincitorio, & Swift, Man and His History 666–667 (1958))[10] or as an effort by reactionary elements to regain control of that country (see Leinwand, The Pageant of World History, *supra*, at 512).[11] Is the expansion of communism in select areas of the world a manifestation of the forces of Evil campaigning against the forces of Good? See Hughes, Man in Time, *supra*, at 565–568, 666–669, 735–748.

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[10] "In Spain early in 1936 a popular-front organization won a victory in the national elections. The result was a government made up of discordant political elements that failed to preserve civil order in the country. Violent anti-Catholics attacked and burned churches and monasteries, and the government did not even try to prevent these crimes. As a result, Spaniards who loved their country and were loyal to their religion revolted against the popular-front government of the republic. An able general, Francisco Franco, put himself at the head of the revolt, which began in July 1936."

[11] "Spain, at the end of World War I, was a backward, poverty-stricken monarchy. In 1931, the king resigned and the people established a republic. The Spanish tried many reforms, but there were many who wanted to go back to the old ways and old privileges of the monarchy. Those who were rich wanted to hold on to their property. These people thought that Francisco Franco, a Fascist, could help them.

"In 1936, a civil war started which soon came to be called a 'dress rehearsal' for World War II because the Fascist countries of Italy and Germany supported Franco and his rebels. On the other hand, Russia supported the loyalists (as the armies of the republic were called). The democratic countries might have supported the loyalists, too, but fear of communism prevented them from doing so. Franco defeated the loyalists and, in 1938, became dictator of Spain and today as *El Caudillo* ('The Leader') still rules Spain with an iron hand."

It will be often difficult, as Mr. Justice Jackson said, to say "where the secular ends and the sectarian begins in education." *McCollum* v. *Board of Education*, 333 U. S., at 237–238. But certain it is that once the so-called "secular" textbook is the prize to be won by that religious faith which selects the book, the battle will be on for those positions of control. Judge Van Voorhis expressed the fear that in the end the state might dominate the church. Others fear that one sectarian group, gaining control of the state agencies which approve the "secular" textbooks, will use their control to disseminate ideas most congenial to their faith. It must be remembered that the very existence of the religious school—whether Catholic or Mormon, Presbyterian or Episcopalian—is to provide an education oriented to the dogma of the particular faith.[12]

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[12] The purpose of the parochial school in the beginning is clear beyond peradventure. The generally held Roman Catholic position in the matter of education in public and parochial schools has been well summarized by the late Monsignor John A. Ryan (1869–1945):

"'. . . As a matter of fact, the State maintains a system of schools which is not completely satisfactory to Catholics, inasmuch as no place is given to morality and religion. Since the Church realizes that the teaching of religion and instruction in the secular branches cannot rightfully or successfully be separated one from the other, she is compelled to maintain her own system of schools for general education as well as for religious instruction. . . .'" 2 Stokes, Church and State in the United States, 654 (1950).

"The education in the parochial schools follows in general the curriculum in the public schools, the main differences being that about 15 per cent of the time is given to religious instruction, and that the Catholic point of view is brought out in the treatment of historical and other subjects, just as the Protestant point of view might be emphasized in a Protestant school." *Ibid.*

Some, however, think that some parochial schools are changing their character under practical pressures of educational competition. See, *e. g.*, Fleming, Fordham Is Trying to be catholic with a Small "c," N. Y. Times Magazine, Dec. 10, 1967, p. 32.

Father Peter O'Reilly put the matter succinctly when he disclosed what was happening in one Catholic school: [13] "On February 24, 1954 Rev. Cyril F. Meyer, C. M., then Vice President of the University, sent the following letter to all the faculty, both Catholics and non-Catholics, even those teaching law, science, and mathematics:

"'Dear Faculty Member:

"'As a result of several spirited discussions in the Academic Senate, a resolution was passed by that body that a self-evaluation be made of the effectiveness with which we are achieving in our classrooms the stated objectives of the University . . . . The primacy of the spiritual is the reason for a Christian university. Our goal is not merely to equip students with marketable skills. It is far above this—to educate man, the whole man, the theocentric man. As you are well aware, we strive to educate not only for personal and social success in secular society, but far more for leadership toward a theocentric society. . . .

"'May I, therefore, respectfully request that you submit answers as specific as possible to the following questions:

"'1. What do you do to make your particular courses theocentric?

"'2. Do you believe there is anything the Administration or your colleagues can do to assist you in presenting your particular courses more "according to the philosophical and theological traditions of the Roman Catholic Church"? Do not hesitate to let us know. There is no objective of our University more fundamental than this. We must all be aware that "the classroom that is not a temple is a den."

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[13] St. John's I: A Chronicle of Folly, 4 Continuum, 223, 233–234 (1966).

"'Please try to have your answers, using this size paper, returned to me by March 10.'"

This tendency is no Catholic monopoly:

"The Presbyterian-affiliated Lewis and Clark College seems to have a similar interest in appearances of autonomy, with a view to avoiding possible legal bars to both federal funds and gifts from some foundations. The change, which legitimizes the college as an autonomous educational institution, removes the requirement that each presbytery in Oregon have at least one representative on the board, but it was made clear 'The college wishes to change *only its legal relationship* to the synod and *not its purposes*,' and promised that it still will elect a minister from each presbytery to the board on nomination of the synod, and will consult the synod before making any change in its statement of purpose, which defines it as a Presbyterian-related college." [14]

The challenged New York law leaves to the Board of Regents, local boards of education, trustees, and other school authorities the supervision of the textbook program.

The Board of Regents (together with the Commissioner of Education) has powers of censorship over all textbooks that contain statements seditious in character, or evince disloyalty to the United States or are favorable to any nation with which we are at war. N. Y. Educ. L. § 704. Those powers can cut a wide swathe in many areas of education that involve the ideological element.[15]

In general textbooks are approved for distribution by "boards of education, trustees or such body or officer as performs the function of such boards. . . ." N. Y. Educ. Law § 701 (1). These school boards are generally elected, §§ 2013, 2502 (2), though in a few cities they are appointed. § 2553. Where there are trustees, they

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[14] *Id.*, 234 (emphasis in original).

[15] Cf. *Adler* v. *Board of Education*, 342 U. S. 485; *Barsky* v. *Board of Regents*, 347 U. S. 442.

are elected. §§ 1523, 1602, 1702. And superintendents who advise on textbook selection are appointed by the board of education or the trustees. §§ 1711, 2503 (5), 2507.

The initiative to select and requisition "the books desired" is with the parochial school. Powerful religious-political pressures will therefore be on the state agencies to provide the books that are desired.

These then are the battlegrounds where control of textbook distribution will be won or lost. Now that "secular" textbooks will pour into religious schools, we can rest assured that a contest will be on [16] to provide those books for religious schools which the dominant religious group concludes best reflect the theocentric or other philosophy of the particular church.

The stakes are now extremely high—just as they were in the school prayer cases (see *Engel* v. *Vitale, supra*)—to obtain approval of what is "proper." For the "proper" books will radiate the "correct" religious view not only in the parochial school but in the public school as well.

Even if I am wrong in that basic premise, we still should not affirm the judgment below. Judge Van Voorhis, dissenting in the New York Court of Appeals, thought that the result of tying parochial school textbooks to public funds would be to put nonsectarian books into religious schools, which in the long view would tend towards state domination of the church. 20 N. Y. 2d, at 123, 281 N. Y. S. 2d, at 810; 228 N. E. 2d, at 798. That would, indeed, be the result if the school boards did not succumb to "sectarian" pressure or control. So,

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[16] The proportions of the contest are suggested in the letter dated November 1, 1967, that the late Cardinal Spellman directed to be read at all the masses on Sunday, November 5, 1967, just before the vote on a proposed Constitution that would have opened wide the door to state aid to parochial schools. I have attached the letter as Appendix B to this opinion.

however the case be viewed—whether sectarian groups win control of school boards or do not gain such control—the principle of separation of church and state, inherent in the Establishment Clause of the First Amendment, is violated by what we today approve.

What Madison wrote in his famous Memorial and Remonstrance against Religious Assessments is highly pertinent here: [17]

> "Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same case any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment,[18] may force him to conform to any other establishment in all cases whatsoever?"

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[17] 2 Writings of James Madison (Hunt, ed., 1901), p. 186.

[18] For a recent account of the extent to which public funds are being poured into sectarian schools see S. Rep. No. 473, 90th Cong., 1st Sess., pp. 9–10 (1967).

APPENDIX A.

CODE—220-399-2-NYSTL REQ. NUMBER .....

TEXTBOOK REQUISITION

PUBLISHERS NAME .....

STREET ADDRESS .....

CITY AND STATE .....

SHIP TO —EDISON WAREHOUSE

STREET —VAN GUYSLING AVE.

CITY & STATE—SCHENECTADY, N. Y.

NO. COPIES ... NAME OF BOOK ..... TOTAL ...

EDITION .....

GRADE LEVEL .....

PRICE PER BOOK ....

Total Amount

I certify that the following number of children residing in your school district have individually requested the loan of the textbook indicated above for the school year 1967–68 in accordance with Section 701, subdivision 2, of the Education Law. Form 1 requests have been submitted to you for each child. I also certify that the textbook requested is a non-sectarian edition and approved for use by a New York State Public School District.

....

Name of Parochial/Private School Official of Private School

APPENDIX B.

Letter of Francis Cardinal Spellman, November 1, 1967.

One of the most precious rights which we have in our civil society is the right to vote. This right should be exercised with reverence and with understanding—particularly when emotional feelings run high.

An important opportunity to exercise this right will be provided on next Tuesday, November 7th. On that day we are asked to choose between the old State Constitution and the proposed new State Constitution. We will decide whether the provisions of the new Constitution will better serve the changing needs of our families, our neighbors, and our institutions, both public and private.

We are faced with a grave responsibility to weigh this choice carefully and to vote conscientiously. I have viewed with concern the tone of the past month's discussion with regard to the proposed new Constitution. I am disappointed that so much of the opposition to the Constitution comes from those forces in our pluralistic society who would deny equal educational opportunities to children attending parochial schools. As a citizen I am dismayed to think that they would have overwhelmingly supported the new Constitution were it not for the fact that it repeals the Blaine Amendment.

The proposed new Constitution, as a whole, is so closely related to our lives that it must command our careful consideration. This document addresses itself to values basic to the fulfillment of our lives as citizens. We must be aware that this Constitution contains new provisions designed to facilitate the rebuilding of our communities, new provisions committing the State to the maximum development of the educational potential of every citizen, new provisions enabling government, in a

responsible way, to mobilize all the forces of society to meet the changing needs of all our people, to enhance their environment and to promote their social well-being.

At the close of the Constitutional Convention I expressed my opinion that the Convention had produced a document worthy of support by the people of New York State. Nothing in the public debate since then has caused me to alter my judgment.

I know that you will conscientiously fulfill your civic duty and that you will give serious consideration to this proposed new constitution.*

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*One parochial school lobbyist group has urged Congress that in order to avoid an establishment of secularism in education, federal monies must be distributed to all the various sects which operate parochial schools.

"[T]here is no valueless or neutral school," it is argued, and education and religion cannot be separated from each other. Hearings on S. 3 and H. R. 1198 before Subcommittee No. 3 of the House Committee on the Judiciary, 90th Cong., 2d Sess., at — (1968) (statement of Dr. Francis J. Brown, chairman, National Association for Personal Rights in Education).

The views expressed by my Brother HARLAN in his concurring opinion are somewhat similar. His approval, on a constitutional basis, of government aid to our country's churches "calculated to achieve nonreligious purposes otherwise within the competence of the State" and not involving the state "'significantly and directly in the realm of the sectarian'" would seem to permit considerable diversion of public funds to the various sects. The state's "competence" in the areas of health, safety, and welfare of the people would under that view permit it to fund a church's charity programs, pay for renovating dilapidated church buildings, and pay for the services and upkeep, such as janitors' salaries and utility bills, necessary to maintain church buildings in safe and healthful condition. Indeed, short of state-provided prayer books, sacramental wine, and the like, churches could, apparently, become virtual state dependencies.

Should that, uphappily, come to pass, then perhaps the church would in time become an administrative arm of the state, a goal

Footnote *—Continued.

predicted by Galbraith for "the mature corporation." The New Industrial State, p. 393 (1967).

Then the circle would be completed and we would return to the point where the long struggle to keep church and state separate first started.

Such a constitutional form of government is conceivable. But proposals for putting each of the Nation's religious sects on the public payroll should be addressed to a federal constitutional convention, since, as my Brother BLACK shows, such a scheme was thoroughly rejected in 1791 with the adoption of the First Amendment.

SUPREME COURT OF THE UNITED STATES

No. 660.—October Term, 1967.

Board of Education of Central School District No. 1, etc., et al., Appellants, *v.* James E. Allen, Jr., as Commissioner of Education of New York, et al.	On Appeal From the Court of Appeals of New York.

[June 10, 1968.]

Mr. Justice Fortas, dissenting.

The majority opinion of the Court upholds the New York statute by ignoring a vital aspect of it. Public funds are used to buy, for students in sectarian schools, textbooks which are selected and prescribed by the sectarian schools themselves. As my Brother Douglas points out, despite the transparent camouflage that the books are furnished to students, the reality is that they are selected and their use is prescribed by the sectarian authorities. The child must use the prescribed book. He cannot use a different book prescribed for use in the public schools. The State cannot choose the book to be used. It is true that the public school boards must "approve" the book selected by the sectarian authorities; but this has no real significance. The purpose of these provisions is to hold out promise that the books will be "secular" (but cf. Douglas, J., dissenting, *ante*, n. 6); but the fact remains that the books are chosen by and for the sectarian schools.

It is misleading to say, as the majority opinion does, that the New York "law merely makes available to all children the benefits of a general program to lend school books free of charge." (*Ante*, p. 6.) This is not a

"general" program. It is a specific program to use state funds to buy books prescribed by sectarian schools which, in New York, are primarily Catholic, Jewish, and Lutheran sponsored schools. It could be called a "general" program only if the school books made available to all children were precisely the same—the books selected for and used in the public school. But this program is not one in which all children are treated alike, regardless of where they go to school. This program, in its unconstitutional features, is hand-tailored to satisfy the specific needs of sectarian schools. Children attending such schools are given *special* books—books selected by the sectarian authorities. How can this be other than the use of public money to aid those sectarian establishments?

It is also beside the point, in my opinion, to "assume," as the majority opinion does, that "books loaned to students are books that are not unsuitable for use in the public schools because of religious content." (*Ante*, p. 8.) The point is that the books furnished to students of sectarian schools are selected by the religious authorities and are prescribed by them.

This case is not within the principle of *Everson* v. *Board of Education*, 330 U. S. 1 (1947). Apart from the differences between textbooks and bus rides, the present statute does not call for extending to children attending sectarian schools the same service or facility extended to children in public schools. This statute calls for furnishing special, separate, and particular books, specially, separately, and particularly chosen by religious sects or their representatives for use in their sectarian schools. This is the infirmity, in my opinion. This is the feature that makes it impossible, in my view, to reach any conclusion other than that this statute is an unconstitutional use of public funds to support an establishment of religion.

This is the feature of the present statute that makes it totally inaccurate to suggest, as the majority does here, that furnishing these specially selected books for use in sectarian schools is like "public provision of police and fire protection, sewage facilities, and streets and sidewalks." (*Ante*, p. 5.) These are furnished to all alike. They are not selected on the basis of specification by a religious sect. And patrons of any one sect do not receive services or facilities different from those accorded members of other religions or agnostics or even atheists.

I would reverse the judgment below.